(1)

90-193

No. -

In the
Supreme Court of the United States

OCTOBER TERM, 1990

ANNE ANDERSON, ET AL.,
PETITIONERS,

v.

BEATRICE FOODS CO.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a party who has been the victim of an adverse party's deliberate discovery misconduct can be denied Rule 60(b)(3) relief when it has been found that the deliberate misconduct substantially interfered with the preparation and presentation of an important issue of the aggrieved party's cause of action?

II. Whether a Rule 11 determination can be made, a) without notice or opportunity to respond; b) against a party for the attorney's pursuit of a claim that was the subject of deliberate discovery misconduct by the adverse party; and c) whether the Rule 11 determination can be used to offset and balance out the sanctions due the aggrieved party for the adverse party's deliberate discovery misconduct?

III. Whether a party who has been the victim of an adverse party's deliberate discovery misconduct can be denied Rule 60(b)(3) relief when the remand proceeding ordered by the Court of Appeals to investigate the discovery misconduct was itself found to be the subject of "strategic concealment" by the attorney for the adverse party of information of "critical importance to the determinations ordered by the court of appeals?"

PARTIES TO THE PROCEEDING

Petitioners:

Anne Anderson individually and as administratrix of the estate of James Anderson; Christine Anderson; Charles Anderson;

Richard Aufiero individually and as administrator of the estate of Jarrod Aufiero; Lauren Aufiero;

Robert Aufiero and Diane Aufiero individually and as parents and next friends of Jessica Aufiero;

Kathryn Gamache individually, as administratrix of the estate of Roland Gamache, and as parent and next friend of Amy Gamache and Todd Gamache;

Kevin Kane, Sr.; Patricia Kane; Kevin Kane, Jr.; Timothy Kane; Kathleen Kane; and Margaret Kane;

Donna Robbins individually, as administratrix of the estate of Carl Robbins III, and as parent and next friend of Kevin Robbins;

Mary Toomey individually and as administratrix of the estate of Richard Toomey and Patrick Toomey; Mary Eileen Toomey;

Pasquale Zona individually and as administrator of the estate of Michael Zona; Joan Zona; John Zona; Anne Zona; Ronald Zona.

Respondent:

Beatrice Foods Co.

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The decision and opinion of the First Circuit Court of Appeals at issue is reported at 862 F.2d 910 (CA1 1988) (App. A) (*Anderson* (I)) and 900 F.2d 388 (CA1 1990) (App. D and E) (*Anderson* (II)). The decisions and opinions of the district court at issue are at 127 F.R.D. 1 (D.Mass. 1989) (App. B) and 129 F.R.D. 394 (D.Mass. 1989) (App. C).

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1990. Petitioners' motion for rehearing was denied April 30, 1990. This petition was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

This petition involves the interpretation of Rules 11 and 60(b) and, by extension, 37 and 26(g), of the Federal Rules of Civil Procedure. Because of their length, they are reproduced in the appendix to this petition (App. X). Although the district court found a violation of 28 U.S.C. § 1927, the Court of Appeals found "this reference adds nothing to the mix," and therefore the court did not address it (A. 113a) and neither do petitioners.

STATEMENT OF THE CASE

Background. Woburn, Massachusetts city drinking wells "G" and "H" were discovered to be contaminated in May, 1979 with toxic industrial solvents — trichloroethylene (TCE), tetrachloroethylene (sometimes referred to as perchloroethylene or PCE), 1,2 transdichloroethylene, and trichloroethane (TCA). The chemicals have been referred to by the lower courts as "complaint chemicals." (A.3a)

The city wells had been placed in the middle of the Aberjona River Valley Aquifer at the bottom of a sand and gravel bowl. Subsequent investigation by the Environmental Protection Agency (EPA) of the properties surrounding the aquifer determined three potential sources of the contamination; a manufacturing plant owned by W.R. Grace and Company (Grace), situated 2400' northeast of the wells, premises owned by Unifirst Company (Unifirst), located 2800' north of the well, and property owned by Respondent Beatrice Foods' Riley Tannery Division (Beatrice), located 600' west-southwest of the wells (A.3a-4a, see Map at App. W).

Petitioners, eight families who drank the contaminated water, seven of which had a child and one an adult with leukemia, pursued the theories that Beatrice, Grace, and Unifirst contaminated the wells causing them to suffer leukemia and other serious health problems. Petitioners' action for personal injury and wrongful death was removed from Massachusetts Superior Court to the federal court by Beatrice and Grace on the basis of diversity jurisdiction under 28 U.S.C § 1332(a). A state court case against Unifirst was settled prior to the trial of the federal case (A.4a-5a).

After initiation of the case, Grace but *not* Beatrice, moved to dismiss under F.R.C.P. Rule 11 on the grounds that there was no reasonable basis to believe that Grace polluted city wells G and H or that the contamination caused leukemia. This was denied by the trial court. See *Anderson* v. *Cryovac, Inc.*, 96 F.R.D. 431 (D.Mass. 1983).

After three and a half years of discovery and two unsuccessful summary judgment motions by defendants on the issue of medical causation (see, *Anderson* v. *W.R. Grace & Co.*, 628 F.Supp. 1219 (D.Mass. 1986), the federal case was tried to a jury on the limited issue of whether Grace and Beatrice contaminated the wells. A jury found against Grace and for Beatrice. The trial court ordered a new trial against Grace. That case settled. Judgment entered for Beatrice, and petitioners appealed. On appeal petitioners discovered that certain scientific studies of the Beatrice property had been concealed during discovery (A.5a-7a).

Beatrice's discovery abuse. Petitioners alleged that Beatrice had used and disposed of complaint chemicals and allowed others to dis-

pose of complaint chemical contaminated waste ("chemical waste") at its Riley Tannery Division property. *After* suit but *before* it responded to petitioners' discovery requests, Beatrice divided its property into two seperate corporate entities — the uphill "tannery" portion farthest from the city wells (tannery) and the downhill "15 acre" wetlands' portion closest to the wells (15 acres). It then transferred ownership of the properties to two separate corporations owned by Mr. John J. Riley, the man from whom Beatrice had originally purchased the property and who had continued to manage the property under Beatrice's ownership. Beatrice retained responsibility for petitioners' suit under an indemnity and cooperation agreement with Riley and the Riley corporate interests (A.4a). Under this agreement, Beatrice, represented by Hale and Dorr, also paid the firm of Nutter, McClennen & Fish to represent Riley and the Riley interests in all matters relating to the petitioners' lawsuit (A.53a).

During discovery, Beatrice denied petitioners access to the *tannery* based on the false assertion it had no control over the property. Petitioners were unable to examine or test the *tannery* (A.41a). Petitioners were only able to examine and test the *15 acres* which was found to be heavily contaminated by complaint chemicals (A.89a). Although the trial court had ruled that petitioners' complaint included the tannery and Beatrice was under a court order to provide tannery information, Beatrice prevented discovery of tannery documents and information by falsely asserting that "no such documents exist." (A31a-34a, 41a.)

Trial of petitioners' claims against Beatrice. During trial petitioners asserted that chemical waste with an orange color, peaty texture and leather-like smell found at the bottom of the tannery hill on the 15 acres, was from the tannery. Petitioners asserted that this "tannery" waste and other complaint chemical waste disposed by others contributed to the pollution of the groundwater and that this groundwater was drawn to the city wells by the wells' pumping action (A.40a, 73a, 80a-84a).

Beatrice asserted that its tannery never disposed of any waste at the 15 acres, and had no knowledge of disposal by others. It denied that the chemical waste at the bottom of the tannery hill was from the

tannery. Further, it asserted that the city wells did not draw groundwater from the tannery and 15 acres. Therefore its property could not be a source of the wells' contamination.

During trial petitioners attempted to prove that the chemical waste at the bottom of the hill was from the tannery through chemical analysis and witness testimony. Tests showed the waste contained high levels of chromium, oil, grease, and complaint chemicals, in particular PCE. The tannery admitted its waste contained chrome, animal fats, and oils. In addition, Beatrice admitted its tannery used complaint chemicals including PCE. Beatrice asserted, however, that it used small quantities of the chemicals over a short period of time and that they were used up in the tannery process. In addition, the petitioners presented testimony from a witness who, as a child, saw tannery personnel dump waste on the side of the tannery hill which drained down onto the 15 acre property in the area where the downhill chemical waste had been found (A.60a, 80a-84a).

The district court ruled that petitioners' circumstantial evidence that the downhill chemical waste was from the tannery was insufficient to go to the jury. The court allowed the jury to hear only petitioners' claim that unknown third persons disposed of chemical waste at the 15 acres and that *this third party waste* resulted in the contamination of the city wells. Asked whether petitioners proved by a preponderance of the evidence that third parties dumped chemical waste at the 15 acres and, if so, whether *that* waste contaminated the city wells, the jury answered, "no." In response to petitioners' request for clarifying questions to be put to the jury regarding their answer, the trial court made a Rule 49(a) finding that petitioners had failed to prove by a preponderance of evidence that the city wells *drew groundwater* from Beatrice's property (A.6a, 10a-11a, 83a).

Uncovering of discovery misconduct on appeal of judgment. During pendency of petitioners' appeal they located two undisclosed hydrogeologic studies of Beatrice's property undertaken by Riley during discovery — a 1983 study by Yankee Environmental Engineering Inc. (Yankee), and an April, 1985 study by GEI, Inc. (GEI). Petitioners moved to vacate judgment under Rules 60(b)(2) and (3) on the basis that the failure to disclose the reports constituted mis-

conduct, and that the concealed reports would have aided petitioners' proof that the tannery had contributed to the contamination of the groundwater, and that the city wells drew groundwater from Beatrice's property. The district court found that while the reports were called for by discovery and should have been produced by Beatrice, petitioners had failed to show by clear and convincing evidence that they were important to petitioners' claims. The district court refused petitioners' request to inquire of the attorneys for Beatrice and Riley concerning the concealment and whether there were any other documents called for by discovery but not produced. Petitioners appealed. (A.22a-23a, 37a).

First Circuit opinion in Anderson (I). A three judge panel consolidated petitioners' initial and subsequent appeals. It dismissed petitioners' original appeal, ruling that the trial court's Rule 49(a) finding regarding petitioners' failure of proof of groundwater flow was soundly based since "*limitations*" on the availability of groundwater flowage information "made it impossible to draw firm conclusions as to whether wells G and H drew water from the 15-acre wetland." (*Anderson* (I) at A.17a-19a).

The court held that Rule 60(b)(3) relief should be granted if the movant demonstrates by clear and convincing evidence that information was improperly withheld *and* that the withheld information "worked some *substantial* interference with the full and fair preparation or presentation of the case." (A.31a) The court recognized that the "substantial" requirement was a higher standard than had been recognized by the other circuits, but stated that the "aggrieved party did not have to establish" that had the misconduct not occurred the "outcome would have been different." (A.25a) The panel stated that "[s]ubstantial impairment may exist . . . if a party shows that the concealment precluded inquiry into *a plausible theory of liability*, denied it access to evidence that could well have been probative on *an important issue*, or closed off *a potentially fruitful avenue* of direct or cross examination." (A.27a).

The court held that substantial impairment may also be shown by presumption in cases where the concealment was knowing or deliberate. In such cases, the burden would be on the spoliator to demonstrate by clear and convincing evidence that the withheld informa-

tion was "nugacious." In the event the adverse presumption was rebutted by the spoliator, the victim need only show substantial impairment by a preponderance of evidence (A.27a-31a).

In the case at hand, the court found that "the record contains clear and convincing evidence — overwhelming evidence, to call a spade a spade — that [Beatrice] engaged in what must be called misconduct under the applicable legal standard." (A.32a). Moreover, the court stated that:

> [Beatrice's] knowledge of the Report, before trial and in ample time to make disclosure, cannot be gainsaid. Its chief trial counsel [Mr. Facher of Hale and Dorr] admitted during the hearing on [petitioners'] Rule 60(b) motion that he had seen the report on January 9, 1986, when it was in the possession of Riley's attorney [Ms. Ryan of Nutter, McClennen & Fish].

(A.34a). However, the court stated that "absent inquiry" it could not tell if the concealment of the discovery material was "knowing and deliberate." (A.39a). The court held that the district court erred in refusing to inquire into matters of "undeniable relevance" to the determination of petitioners' entitlement to Rule 60(b)(3) relief. This included the knowledge and involvement of Beatrice and its attorneys in the concealment of the reports by Riley and his attorneys and whether other undisclosed information "lurked in the shadows." (A.37a). The panel emphasized that "if Beatrice was a knowing party to this coverup, its bona fides could be affected," therefore "*this aspect of the matter merits aggressive inquiry on remand.*" (A.35a).

The court retained jurisdiction of the appeal and remanded the matter to the district court. The court stated that "on remand, the district court must consider . . . whether nondisclosure of the report impeded plaintiffs from targeting the tannery as a source of contamination and fully and fairly preparing their case *in that respect.*" (A.39a-40a). The court explained as follows:

> Beatrice's misconduct notwithstanding, we see no need to revisit the 15-acre wetland and the district court's Rule 49(a) find-

> ing that no pollutants flowed to wells G and H from that site. . . . Although [petitioners] argue that the Report would have assisted them on the issue of groundwater flow vis-a-vis the wetland . . . the [district] court held that the Report was inconsequential to those issues resolved by the Rule 49(a) finding . . . .
>
> The second string to [petitioners'] bow is markedly more resilient. They contend that the Report would have aided their efforts to obtain discovery on another theory of their case: that contaminants reached the groundwater *directly from the tannery*, and thereafter were *drawn under* the 15 acres to wells G and H, through the pumping action of these wells. . . .
>
> That such a claim was actually before the district court is not much subject to doubt. The notion was *properly pleaded* by [petitioners], the tannery site being within the scope of their amended complaint. . . . Having raised the issue, [petitioners] thereafter sought to pursue it, not hotly and heavily but with some degree of interest and diligence. They attempted to conduct discovery concerning the tannery, requested access to the tannery property for purposes of testing and investigation, and were refused permission to enter. *Thus, [petitioners] seem to have been deprived of any fair chance to develop this aspect of their case.*

(A.40a-41a.) (Emphasis added.)

In addition, the district court was ordered to determine Beatrice's knowledge and involvement in the withholding, the relationship between Beatrice and Riley and their attorneys, the extent of the concealment effort, and the "appropriateness *vel non* of sanctions anent any unexcused discovery violations." (A.35a, 42a-43a).

Remand proceedings. The special proceedings held by the district court (January-March, 1989) revealed that Riley and his attorney, Ms. Ryan, had deliberately withheld not only the two reports but hundreds of other documents regarding use of chemicals, contamination and groundwater flow tests and investigations, and disposal activities that had occurred at both the tannery and the 15 acres (A.46a-55a, 126a-131a, 157a-160a, 162a). More startling, contrary

to Beatrice's and Riley's vehement denials before and during trial, the tannery, during discovery, had conducted several secret waste removal operations at the 15 acres. One particular purpose of these secret operations was to remove the chemical waste found at the bottom of the tannery hill (A.49a-52a, 80a-87a, 126a-131a).

Beatrice denies knowledge and involvement in discovery misconduct. During the remand proceedings, Beatrice called its attorneys (Jerome Facher and Neil Jacobs of Hale and Dorr) to the stand. They reaffirmed previous submissions to the court that Beatrice and its attorneys first learned of the Yankee report in January, 1986 at the time of the deposition of the Riley Tannery's recordkeeper, and the GEI report in October, 1985; took no notice of the reports; and did not obtain copies of them until the filing of plaintiffs' Rule 60(b) motion in September, 1987 (A.47a-49a, 123a-125a, 130a-142a). The attorneys swore that the indemnity provision contained in the Asset Purchase Agreement between Beatrice and Riley "had no significance in discovery from the tannery," and "no connection between the Report and the Asset Purchase Agreement ever occurred" to the attorneys (A.134a). Riley attorney Ms. Ryan of Nutter, McClennen & Fish supported this testimony. In a written statement jointly signed by her and Mr. Facher, she stated, "[a]s of January, 1986 . . . the [Yankee] report had been maintained in confidence . . . [and] *[t]o my knowledge, it had never been disclosed to any person outside of Riley Company and my law firm.*" (A.149a-150a).

Trial Court's findings regarding discovery misconduct. On July 7, 1989 the district court found that Riley had "deliberately concealed" the Yankee and GEI reports as well as the numerous other documents uncovered during the remand proceedings. The court found "in his testimony on deposition and at trial Riley denied the existence of these reports," "laboratory reports and chemical formulas." The court concluded "that the pattern of evasive answers concerning these reports and the other documents by Mr. Riley requires a finding that the concealment was deliberate." The court also found that attorney Ryan had engaged in deliberate misconduct. She "did know about [the reports] and did not correct the answer" by the recordkeeper that no other documents existed. The court found that "[b]y this lack of candor and subsequent misdirection the plaintiffs were led to believe that no other reports existed." (A.53a-55a).

The court exonerated Beatrice's attorneys even though they, like Ms. Ryan, knew of the reports at the time of the recordkeeper's deposition, and Mr. Facher, like Ms. Ryan, was present during the recordkeeper's response and did not correct it (A.132a, 171a-173a, 177a-178a). The court stated it had "no reason to doubt" the testimony of the Hale and Dorr attorneys that they paid no attention to the reports (A.48a-49a).

However, the district court found Beatrice legally responsible for the conduct of Riley and attorney Ryan because:

> It is clear that Ms. Ryan and defendant's lawyers were in close communication with one another during the discovery period and in preparation for the trial in this case. A large part of the fees charged by Ms. Ryan's law firm for her representation of the Riley interests were paid by Beatrice. . . . [D]efendant's attorneys shifted the responsibility for dealing with the plaintiffs' attempts to obtain discovery of Riley documents to Ms. Ryan. . . . In my view, the activities of Ms. Ryan, Mr. Riley and the defendant's attorneys were so functionally synergistic, . . . that the conduct of Ms. Ryan and Mr. Riley should be attributed to the defendant.

(A.53a).

Revelation by Riley's attorney that "critical information" was concealed during remand proceeding. Because of the deliberate misconduct finding, Ms. Ryan withdrew as counsel and retained personal counsel. Three months later, in October, 1989 she moved for reconsideration and requested an opportunity to present evidence. Ms. Ryan submitted the affidavits of herself and her partner Robert Fishman (A.163a-176a, 193a-207a). She asserted that her actions were undertaken "after consultation with experienced counsel for the defendant — *counsel who were fully aware* of the Yankee and GEI reports, as well as their background and context." (A.199a).

The affidavits demonstrated that, contrary to Beatrice's and its attorneys' sworn testimony, they had been told about the Yankee and GEI investigations and reports at least as early as October, 1984 (A.163a-164a); had been given copies of the reports at the time of

the deposition of the tannery's recordkeeper (A.169a-170a); had advised Ms. Ryan not to be concerned with the recordkeeper's negative response regarding the existence of the reports (A.172a-173a); and had used the indemnification agreement to pressure Riley and his attorneys not to test the property or disclose the existence of the studies or reports to petitioners (A.165a, 174a).

The affidavits revealed that Beatrice was "*concerned about generating test data that potentially could be subject to discovery in the ongoing federal litigation* and . . . did not want Mr. Riley drilling any new wells on the tannery property." The reason for Beatrice's concern was that "as of that date, plaintiffs' allegations had been limited to unauthorized disposal on the 15 acres, and that there had been a firm distinction between the tannery and the 15 acres." (A.164a). The affidavits revealed the way in which Beatrice used the indemnification agreement to control the flow of information from Riley and his attorneys:

> Mr. Jacobs [of Hale and Dorr] . . . informed me that it was the defendant's position that Mr. Riley would be on his own with respect to the indemnification agreement between Riley company and the defendant in the event that he performed any testing upon the main tannery parcel, the main tannery parcel became involved in this litigation, and the testing was subject to discovery in the litigation process. Mr. Jacobs additionally informed me that if Mr. Riley generated information that was harmful to the defendant's case, then the defendant would look to Mr. Riley's company for some dilution of the indemnification agreement. This position was reiterated in subsequent conversations.

(A.164a-165a). "Nutter, McClennen & Fish believed that this position was unreasonable" and so "communicated to Hale and Dorr." (A.174a)

Beatrice's attorneys' claimed lack of memory. Beatrice and its attorneys in response to these revelations submitted affidavits claiming lack of memory (A. 178a-179a, 182a, 184a-185a, 187a-188a, 191a). In reply, Riley's attorneys submitted an offer of proof iden-

tifying *forty-one documents* which would attest to the truth of their statements (A.193a-198a). In addition, Riley's attorneys detailed a chronology of communications dating from November, 1983 to November, 1986 between the law firms concerning Beatrice's knowledge and involvement in the concealment of the Yankee and GEI studies during discovery, trial, and after trial (A.201a-203a).

Trial court's finding that remand proceeding subject of fraudulent concealment. Petitioners moved for the production of the relevant documents, inquiry, that Beatrice be estopped from denying the importance of the deliberately withheld documents, for a directed finding on the issue of importance, for disqualification of counsel, and for sanctions for fraud on the court (A.91a).

The district court responded to the revelations by Ms. Ryan as follows:

> It was abundantly clear from the tenor of the [remand] hearings, as well as from the opinion of the court of appeals, that communications from Riley to the defendant and among their respective lawyers was of critical importance to the determinations ordered by the court of appeals.
>
> Ms. Ryan came forward three months after my findings were filed with an affidavit asserting communications with defendant's attorneys never before revealed, said to be supported by no less than forty-one documents contradicting defendant's attorneys in several respects. No rule of due process that I know of permits an attorney in Ms. Ryan's position, under an order to make a complete statement, to withhold information until such time as it is to her advantage to reveal it, and then to insist that the court retry the whole matter. Such a rule would put a premium on strategic concealment, which is what these proceedings are all about, and violate the policy of repose.

(A.103-104a). The trial court denied Ms. Ryan's motion to present evidence for lack of standing (A.102a) and barred the filing of any more pleadings or papers (A.224a).

Trial court's recommendation. In response to petitioners' request for inquiry and sanctions for Beatrice's deliberate spoliation and

fraud on the court, the district court, *on its own*, without notice or opportunity to respond, found that petitioners should be sanctioned under Rule 11 for their counsel's pursuit of the tannery claim (A.91a-93a). The finding was based on the district court's *in camera* review of petitioners' pre-trial private investigation report (A.77a-78a, 88a). The trial court had ordered the production of petitioners' investigative file during the remand proceedings for the *sole purpose* of determining whether petitioners had "comparable" information to the data that had been deliberately concealed. The trial court stated that if the file contained more than guesswork and surmise regarding the tannery, then petitioners would not be entitled to Rule 60(b)(3) relief (A.226a-227a). The trial court found that the file *did not* reveal any additional information (A.80a-81a). Nevertheless, the trial court recommended that petitioners be denied Rule 60(b)(3) relief. Moreover, it recommended that petitioners be sanctioned and that these sanctions be used to offset and balance out the sanctions due petitioners for Beatrice's deliberate misconduct (A.92a-93a).

Based on petitioners' presentation of expert testimony and evidence during the remand proceeding the trial court found that Beatrice's deliberate suppression of discovery material had substantially interfered with petitioners' proof that the city wells drew groundwater from the tannery (A.79a-80a, 87a-88a, 214a-222a, App. W). This finding called into question the trial court's previous Rule 49(a) finding. However, the trial court recommended that petitioners not be granted Rule 60(b)(3) relief because there is "*no available competent evidence* tending to prove that it is *more probable than otherwise* that [Beatrice] *disposed of the complaint chemicals* at either the tannery site or the 15 acres." (A.87a).

The First Circuit's opinion in Anderson II. The Court of Appeals adopted the district court's findings and recommendations in their entirety, denying petitioners any relief or sanctions (*Anderson* (II) at A.109a). The Court's opinion neither acknowledged nor addressed the revelations by Rileys' attorneys that Beatrice and Riley and their attorneys had falsely testified during the remand proceedings regarding Beatrice's knowledge and involvement in the suppression of the discovery information. Nor did the Court discuss the finding by the district court that the remand proceedings had been the subject of

fraudulent concealment of this critical information. The court rejected petitioners' claim that the remand proceeding had been the subject of fraud *solely* on the basis of the district court's July, 1989 finding *that the Yankee and GEI reports had been deliberately withheld during discovery* but that there was not clear and convincing evidence that they had been fraudulently concealed during discovery. The Court stated:

> There was no fraud here. The district court so found, explicitly, see *Anderson* v. *Beatrice Foods Co.*, 127 FRD at 1 [July 7, 1989 finding regarding nature of discovery misconduct, (A.45a)] (court "found no evidence of fraud"), and implicitly — its finding of 'deliberate misconduct," *id.* at 6, negated a finding of fraud . . .

(A.119a). The Court did not acknowledge or discuss the district court's finding made *five months later* on December 4, 1989 (A.101a, 103a-104a) that the remand proceeding upon which the district court had based its July 7, 1989 finding of "deliberate discovery misconduct" but "no fraud" was itself the subject of "strategic concealment" of "critical" information.

The Court held that it was proper for the district court to use its discretion to recommend Rule 11 sanctions against petitioners for their counsel's pursuit of the tannery claim, and to use those sanctions to balance out the sanctions due petitioners for Beatrice's deliberate spoliation. The Court based this on the trial court's purported estimate "that the monetary losses suffered by the respective "victims" was nearly the same, that is to say, Beatrice's Rule 37 misconduct cost [petitioners] about the same, in terms of counsel fees and expenses, as [petitioners] Rule 11 misconduct cost Beatrice." (A.117a). In fact, the district court had stated that the "honors for sanctionable conduct are about evenly divided." (A.91a). It had not discussed costs.

The panel reaffirmed that the "pivotal question" regarding petitioners' entitlement to Rule 60(b)(3) relief was whether there had been substantial interference with the preparation or presentation of petitioners' tannery claim. Although the district court had made such a finding regarding the groundwater flow issue, the panel stated that this "pivotal question" should not be "wrenched out of the case's context." (A.109a-

110a). Since chemical use and disposal of the complaint chemicals was an important issue and the district court had found that there was "no evidence" regarding this issue and therefore "*[petitioners] would not have been able to prove the essential elements of a 'tannery' case*," it was proper for the district court to deny petitioners' relief *despite* the trial court's finding that there had been substantial impairment of the equally important groundwater flow issue (A.111a).

Petition for rehearing. In response to petitioners' motion for a rehearing on the basis that the panel had overlooked or misapprehended certain basic facts and points of law, the court discussed only petitioners' claim that the Rule 11 finding by the district court was made without according petitioners their right to due process. Overlooking the fact that petitioners had argued in their brief in response to the district court's final report that the Rule 11 finding was patently "unjust" coming as it did for the first time in the court's final report "out of the blue," the court found that the argument was defective because it had not previously been raised (A.122a).

The court also rejected petitioners' due process claim on the merits. It held that although the Rule 11 determination had been made against petitioners by the district court without any notice or opportunity to respond, *petitioners had been accorded due process* since the district court "did not *impose* a sanction; it merely made a recommendation that we do so." (A.122a). Having made the distinction, the panel found that it made no difference, since it treated the recommendation *exactly like a finding of fact*, disturbed only if it was an abuse of discretion (A.122a).

Post-appeal related proceedings. One of the petitioners subsequently filed in Superior Court for the Commonwealth of Massachusetts a complaint for discovery of the documents and information revealed at the end of the remand proceeding but never produced by Riley's attorneys. Beatrice moved in federal district court to enjoin petitioner from proceeding with the Massachusetts action for discovery. The district court's denial of the injunction was then appealed. While the appeal was pending, the Superior court dismissed petitioner's discovery complaint on the basis of lack of jurisdiction on the grounds of collateral estoppel. The appeal of the district

court's denial of injunctive relief was then stayed pending the outcome of petitioner's appeal of the state court dismissal of its discovery complaint.

REASONS FOR GRANTING THE WRIT

The opinion of the First Circuit Court of Appeals, No. 88-1070, reported in *Anderson* (I) and (II), should be reviewed by this court. At issue is the way law should be practiced in the federal courts. Review is needed to examine and remedy discovery abuse and fraud unprecedented by its documentation and extent.

The decision must be examined because it directly contravenes the basic principles annunciated by this court that trials are to be "less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent," *United States* v. *Proctor & Gamble*, 356 U.S. 677, 682 (1958), and victims of discovery abuse and fraud should be compensated and that those who seek advantage by spoliating the record be punished, *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 763-64 (1980); *National Hockey League* v. *Metropolitan Hockey Club*, 427 U.S. 639, 643 (1976).

Review would allow this court to annunciate for the first time the standards by which discovery misconduct should be measured under Rule 60(b)(3). Left unreviewed, the opinion in *Anderson* (II) will stand for the proposition that an adverse party can retain the benefits of a judgment even though the party has engaged in deliberate discovery misconduct which substantially interfered with the preparation and presentation of the aggrieved party's case. Left unreviewed, the opinion will stand for the proposition that determinations regarding entitlement to Rule 60(b)(3) relief should be based on determinations regarding the sufficiency of evidence rather than whether the discovery misconduct interfered with the development of evidence in a case. Such a standard directly conflicts with the Rule 60(b)(3) standards that have been established by other circuits, *In Re M/V Peacock*, 809 F.2d 1403, 1404-05 (CA9 1987) (Kennedy, J.); *Harre* v. *A.H. Robbins Co.*, 750 F.2d 1501, 1503 (CA11 1985);

Stridiron v. *Stridiron*, 698 F.2d 204, 207 (CA3 1983); *Square Construction Co.* v. *Washington Metropolitan Area Transit Authority*, 657 F.2d 68, 71 (CA4 1981); *Rozier* v. *Ford Motor Company*, 573 F.2d 1332, 1339 (CA5 1978), and were adopted for the first time by the First Circuit in *Anderson* (I) (A.25a).

Left unreviewed, *Anderson* (II) will permit Rule 11 to be used as a device to inequitably reward those who have deliberately spoliated the record and to unjustly punish the victims who uncovered it. Such a proposition violates the fundamantal equitable principles established by this court that a litigant should not benefit from its own malfeasance, see *Minneapolis, St. Paul, & Sault Ste. Marie Ry. Co.* v. *Moquin*, 283 U.S. 520, 521-22 (1931), that Rule 11 should deter not encourage abuse of the civil justice system, *Cooter & Gell* v. *Hartmarx Corp.*, ___ U.S. ___, ___, 110 S.Ct. 2447, 2454 (June, 1990); *Pavelic & LeFlore* v. *Marvel Entertainment Group*, 493 U.S. ___, ___, 110 S.Ct. 456, 460 (1989), and that sanctions should not be imposed without adequate notice or opportunity to respond, *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 767 (1980).

Anderson (II) should be reviewed by this court in the exercise of its supervisory powers. The decision condones by silence an extensive and ongoing fraud on the federal judiciary, a fraud that has been documented by respondent's own attorneys, and found by the district court. To complacently tolerate this fraud is inconsistent with the good order of the civil justice system and society. See, Rule 10 of the United States Supreme Court; *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 246 (1944).

I. THE *ANDERSON* (II) OPINION VIOLATES THE RULE 60(b)(3) STANDARDS ESTABLISHED BY THE CIRCUITS AND THE FIRST CIRCUIT IN *ANDERSON* (I).

This court has yet to annunciate the standards by which discovery misconduct by a party requires vacation of judgment for that party. The circuits have clearly established that misconduct of a party in withholding information in discovery that interferes with the aggrieved

party's preparation or presentation of its case is sufficient to mandate relief regardless of what effect the misconduct may be deemed to have had on the outcome. Although the Court in *Anderson* (I) placed a greater burden on victims of discovery misconduct than the other circuits by including the requirement that the interference be "substantial," it recognized that a party "still need not prove that the concealed material would likely have turned the tide at trial" (A.27a). Unlike its Rule 60(b)(2) counterpart, the Court noted, as has its sister circuits, the focus of Rule 60(b)(3) is on "judgments which were *unfairly procured*" "not on erroneous judgments." (A.25a); see *In Re M/V Peacock*, 809 F.2d 1403, 1405 (9th Cir. 1987) (Kennedy, J.) ("The rule is aimed at judgments which were unfairly obtained, not at those which are factually incorrect"). Therefore, the focus in *Anderson* (II) should have been on the fairness of the civil process accorded petitioners in the *Anderson* case and not on the merits of the claims petitioners prosecuted.

The Court in *Anderson* (II) characterized its approval of the trial court's recommendation that petitioners not be granted relief under Rule 60(b)(3) as deferential. However, it was not open to the trial court's discretion to deny petitioners Rule 60(b)(3) relief in the face of its own finding that Beatrice's deliberate discovery misconduct *substantially impaired an important issue of proof* regarding petitioners' claims, namely that the city wells drew groundwater from Beatrice's property (A.109a).

The importance of the groundwater flow issue to petitioners' claims cannot be gainsaid. The Court in *Anderson* (I) denied petitioners' original appeal on the basis that the trial court was justified in finding that there was insufficient evidence on the flow issue (A.17a-18a). The appeal was dismissed because, according to the Court, the groundwater flow issue was "the vital third link of [petitioners'] causal chain," without which "[petitioners'] tort claims are sunk." (A.20a).

The interference with petitioners' proof of the flow issue caused by Beatrice's deliberate withholding of discovery information was therefore sufficient at law to require granting petitioners' Rule 60(b)(3) motion. The Court in *Anderson* (I) citing *Seaboldt* v. *Pennsylvania Railroad Company*, 290 F.2d 296 (CA3 Cir. 1961)

established that "substantial impairment may exist . . . if a party shows that the concealment precluded inquiry into *a plausible theory* of liability, denied it access to evidence that could well have been probative on *an important issue*, or closed off *a potentially* fruitful avenue of direct or cross-examination." (A.27a).

The Court in *Anderson* (II), however, justified the trial court's recommendation that petitioners' be denied relief on the basis that "*plaintiffs would not have been able to prove the essential elements of a 'tannery' case*," because of a purported "dearth of evidence" regarding chemical use and disposal of chemicals by the tannery (A.111a). This directly contravened the legal standards the court established in *Anderson* (I). The court stated that "[o]pportunity for discovery is the issue where the tannery is concerned, *not sufficiency of the evidence*." (A.43a). Yet the Court in *Anderson* (II) adopted the trial court's "no relief" recommendation because of a purported insufficiency of evidence regarding the tannery claim.

Having established in *Anderson* (I) the standards by which motions under Rule 60(b)(3) are to be judged, the Court in *Anderson* (II) allowed the trial court to violate them. By doing so, the Court turned the Rule 60(b)(3) standard away from an examination of whether misconduct interfered with the process by which cases are developed and evaluated, and towards a determination of whether the case was worth protecting against such misconduct. Such an approach perverts the fundamental interest behind Rule 60(b)(3) to insure the integrity of the civil justice process and derogates the fundamental right to a fair trial by jury. See, F.R.C.P. Rule 60(b); the Seventh Amendment to the United States Constitution; and *United States* v. *Proctor & Gamble*, 356 U.S. 677, 682 (1958). It also totally ignores the fact that when a party corrupts the process it denies the other party, the court, and the jury, the full and fair opportunity to evaluate the merits of a claim.

This case best illustrates the absurdity inherent in the case evaluation approach for determining entitlement to Rule 60(b)(3) relief adopted by the Court in *Anderson* (II):

The "dearth of evidence" finding contradicted Beatrice's admissions and the First Circuit's findings in Anderson (I). Beatrice admitted that during the relevant time period the tannery used two of

the complaint chemicals found in the City wells and in the downhill waste on the 15 acres (A.80a-84a). The Court itself had found in *Anderson (I)* that the deliberately withheld discovery information showed "*two of the complaint chemicals present at the tannery site*" and "characterized the data as suggesting that the *tannery was 'the probable source'* " of at least one of the complaint chemicals (A.42a).

The "dearth of evidence" finding was made without giving petitioners the benefit of any adverse inferences or presumptions. Petitioners were not given any adverse inferences from the trial court's findings that Beatrice, Riley, and its attorneys had engaged in deliberate withholding and destruction of evidence regarding tannery chemical use and disposal of complaint chemical waste. No adverse inferences were given petitioners regarding the deliberate withholding of the studies that the Court of Appeals acknowledged showed complaint chemical contamination at the tannery (A.42a). No adverse inferences were given for the deliberate withholding of chemical formulas which indicated complaint chemical use (A.54a, 76a). No adverse inferences were given for the tannery's secret removal of the very chemical waste that petitioners had asserted and Beatrice had vehemently denied came from the tannery (A.49a-52a, 126a-128a, 131a, 162a). And no adverse inferences were given for the admission by Riley's attorneys that the purpose of the spoliation was to keep the tannery out of the case (A.164a-165a).

Petitioners had an absolute entitlement to these adverse inferences. In *Anderson* (I) the Court citing *Nation-Wide Check Corp.* v. *Forest Hills Distributors, Inc.*, 962 F.2d 214, 217-19 (CA1 1982) reaffirmed that "[d]eliberate nonproduction or destruction of relevant document *is evidence* that the party which has prevented production did so out of the well-founded fear that the contents would harm him." (A. 28a).

Neither the district court nor the Court in *Anderson* (II) gave the petitioners the benefit of the legal presumption from Beatrice's deliberate misconduct that there was a tannery case or that a tannery case could have been developed absent the deliberate spoliation by Beatrice. (A.111a) The Court established in *Anderson* (I) that "in the case of intentional misconduct, as where concealment was knowing and purposeful, it seems fair to presume that the suppressed evi-

dence would have damaged the nondisclosing party." (A.27a-28a). The Court in *Anderson* (I) with equal conviction stated that "it seems equally logical that where discovery material is deliberatelty suppressed, its absence can be presumed to have inhibited the unearthing of further admissible evidence adverse to the withholder." (A.28a).

Notwithstanding those principles, petitioners were denied in *Anderson* (II) the adverse inferences and presumptions to which they were entitled. Far from being given the benefit of the inferences and presumptions, the district court and the Court in *Anderson* (II) resolved all doubts and uncertainties in favor of Beatrice (A.88a, 111a) contrary to the very standards established in *Anderson* (I).

The "dearth of evidence" finding was made on a spoliated record. The finding that there was "no evidence" regarding chemical use or disposal completely ignores the record upon which the finding was made, a record corrupted by Beatrice's deliberate misconduct. Beatrice admitted during the remand proceedings that it still has not made a complete search of tannery information. Attorney Ryan admitted during the remand proceeding that "there were numerous, numerous files that were not searched . . . there was further testimony about formulas, et cetera, documents that were not searched . . . *I have not searched these to this day*." (A.210-211a).

The "dearth of evidence" finding ignored the fact that the tannery's condition has never been and can never be determined. The finding of "no evidence" was made without the petitioners ever having been granted access to the tannery to test or investigate its condition (A.41a). Its condition during discovery has never been established and can never be established. Such an attempt by the trial court during the remand proceeding was abandoned after the revelation that the condition of the tannery property had been substantially altered (A.75a-76a, 93a, 100a-101a, 230a). The trial court explained during the remand proceeding "as that investigation progressed, it turned out that there has been material alterations in the geography and in the site and the *relevance now or ever of testing at this point is certianly in question*" (A. 230a). Moreover, the trial court's subsequent contradictory "finding" that it was a "remote" "possibility" (A.88a) that testing at the tannery would demonstrate contamination was made against petitioners to the benefit of Beatrice,

even though as victims of Beatrice's deliberate misconduct under the Rule 60(b)(3) standards established by the Court in *Anderson* (I) and the principles of equity established by this court, "uncertainties attending the application of hindsight in this area should redound to the movant's benefit," not the malefactor's (A.26a).

II. The Court's Decision in *Anderson* (II) Invites Discovery Abuse by Inequitably Rewarding the Spoliator and Unjustly Punishing the Victim.

Although this court has recently stated that all aspects of a trial court's Rule 11 determinations should be treated with great deference, such deference does not extend to an "erroneous view of the law or a clearly erroneous assessment of the evidence." *Cooter & Gell* v. *Hartmarx Corp.*, *supra* at 110 S.Ct. at 2461. Review should be granted in this case because the trial court's use of Rule 11 was both legally improper and factually unfounded.

Contrary to the purposes of Rule 11, deliberate spoliation was rewarded and its uncovering punished. The Rule 11 determination was inequitable and made without according petitioners even the rudiments of due process. It was based on the district court's improper use and flatly mistaken reading of petitioners' pre-trial private investigation file. And the finding of "no evidence" regarding the tannery claim which formed the basis of the Rule 11 determination was made without giving petitioners the benefit of the substantial circumstantial evidence uncovered during discovery and on remand. Nor were petitioners given the benefit of any of the adverse inferences and presumptions from Beatrice's deliberate withholding and destruction of tannery evidence (see Section I at 19-20 above).

Rule 11's purpose is to deter not reward abuse. It is the purpose of Rule 11 to deter attorneys from signing pleadings without making inquiry or having a reasonable basis. *Cooter & Gell* v. *Hartmarx Corp.*, *supra* at 110 S.Ct. at 2454. The obligation rests squarely on the attorney who signs the pleading and on no one else. It is the attorney who signs who must bear the consequences of the rule's vio-

lation. *Pavelic & LeFlore* v. *Marvel Entertainment Group*, *supra* 110 S.Ct. at 459-60. It is not the purpose of Rule 11 to reward a party for engaging in spoliation or to encourage spoliation by depriving its victims of relief or sanctions. *Cooter & Gell* v. *Hartmarx Corp.*, *supra*, 110 S. Ct. at 2456 (Rule 11 was amended to its present form "in response to concerns that abusive litigation practices abounded in the federal courts"). Nor is it the rule's purpose to chill the enthusiasm of attorneys to uncover spoliation by the opposing party or to determine whether their client's claims have been affected by the misconduct. On the contrary, "the rule must be read in light of concerns that it will . . . chill vigorous advocacy." *Id.* at 2456. And "any interpretation must give effect to the rule's central goal of deterrence" against abuse of the judicial system. *Id.* at 2456.

The *Anderson* (II) opinion undermines Rule 11's purposes. By using a purported violation of Rule 11 by petitioners' counsel as an excuse for not addressing Beatrice's deliberate misconduct, the Court excused Beatrice's deliberate and extensive spoliation. And it punished petitioners for uncovering it and bringing it to the court's attention. By so doing, the Court in *Anderson* (II) has provided an incentive to parties contemplating spoliation to engage in enough of it to qualify for offsetting sanctions. The more extensive the spoliation, the less evidence available to the victim to prove the claim or justify its pursuit. It also "chills the enthusiasm" of victims of extensive spoliation to uncover the misconduct or to pursue claims that might have been affected by the misconduct. To do so could subject them, as in this case, to an unfair and unjust finding that they violated Rule 11.

The Rule 11 determination was inequitable. The Court in *Anderson* (II) should not have allowed Beatrice to benefit through sanctions against petitioners for what petitioners did based on a record corrupted by Beatrice. It was Beatrice's misconduct that directly contributed to the incomplete record upon which petitioners evaluated their tannery claim. It was Beatrice's obligation in the first instance to provide petitioners with all available information. It was Beatrice's default of this obligation which denied petitioners the opportunity to make an informed judgment based on all available information. It was Beatrice's default that made the remand proceeding necessary.

It was therefore fundamentally inequitable for the court to have gratuitously granted Beatrice the benefit of sanctions for what petitioners did in ignorance of information Beatrice had an obligation to provide.

The Court's approval of the district court's grant of Rule 11 benefits to Beatrice flies directly in the face of its own declaration in *Anderson* (I) of the fundamental principle of equity that "parties ought not to benefit from their own mis-, mal-, or nonfeasance" citing this court's opinion in *Minneapolis, St. Paul, & Sault Ste. Marie Ry. Co.* v. *Moquin*, 283 U.S. 520, 521-22 (1931) ("litigant who engages in misconduct 'will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent' ") (A.26a).

It is ironic that the Court in *Anderson* (II) allowed Beatrice the benefit of sanctions for petitioners' pursuit of the tannery claim when it was Beatrice's position on appeal that petitioners should have been denied Rule 60(b)(3) relief because they had previously paid "comparatively little attention to the tannery during discovery." (A.41a). In response to this assertion by Beatrice the Court in *Anderson* (I) held that petitioners had "*properly pleaded*" and pursued their tannery claim with "diligence" but were "refused permission to enter . . . the tannery property for purposes of testing and investigation" because of Beatrice's "specious argument that Beatrice could not grant access to the tannery property." (A.41a). Because it appeared that petitioners had been deprived of "any fair chance to develop" their tannery claim (A.41a), the Court in *Anderson* (I) remanded to determine "whether" the spoliation "substantially interfered with [petitioners'] efforts to prepare and present" a tannery case (A.42a). In these circumstances, how can the court in *Anderson* (II) fault petitioners for pursuing the court's mandate in *Anderson* (I) — a mandate necessitated by Beatrice's deliberate misconduct?

Petitioners should not have been punished for paying too much or too little attention to the tannery. When the record is made incomplete by spoliation, it cannot be known what would have occurred absent the spoliation. The Court in *Anderson* (I) recognized this principle when it rejected as "idle persiflage" Beatrice's assertion that petitioners' discovery conduct would not have changed had Bea-

trice complied with its obligations (A. 41a). On the contrary, it was the court's belief in *Anderson* (I) based on its review of the concealed reports that indeed the information could well have aided petitioners in developing their tannery theory. The court reasoned:

> Pretrial discovery follows not set course. An able litigator builds on the information available from time to time, changing direction as new leads emerge and old ones wither. *Elementary logic suggests that [petitioners] likely slighted the tannery because they had no evidence, beyond guesswork and surmise, to show that it contributed to the pollution. The report could have filled this void*: Yankee found two of the complaint chemicals present at the tannery's site; characterized the data as suggesting that the tannery was 'the probable source' of 1,2, Transdichloroethlene contamination at the production well on the Riley tannery property; and concluded that groundwater under the tannery site flowed from west to east, toward wells G and H. Such information, if known to counsel, might have made the tannery a higher-priority item on [petitioners] discovery agenda.

(A.41a-42a). In these circumstances, it was patently inequitable of the Court in *Anderson* (II) to have faulted petitioners for pursuing the tannery claim. The error was compounded by using that "fault" as the excuse for not dealing with Beatrice's deliberate misconduct.

Moreover, the Court erred when it affirmed the trial court's equating the "cost" of Beatrice's deliberate misconduct as equal to the "cost" of petitioners' purported Rule 11 misconduct. This court has recently held that Rule 11 "is more sensibly understood as permitting an award only of those expenses directly caused by the filing, logically, those at the trial level." *Cooter & Gell, supra* at 110 S. Ct. 2461. Here there never was a trial of the tannery case and the post-appeal remand proceedings were necessitated solely by Beatrice's misconduct. Since there has been no finding that petitioners' appeal of the trial court's denial of their Rule 60(b)(3) motion resulting from Beatrice's misconduct was frivolous, how can costs due petitioner's for the "post-appeal" remand proceeding possibly be offset by the Rule 11 determination? And how can the costs be determined to be "equal" when *no* determination of costs has ever been made?

The Rule 11 determination violated due process. The Rule 11 determination was simultaneously alleged, found, and the sanction recommedation imposed by the district court, on its own, without giving petitioners or their counsel any notice or opportunity to respond in the first instance. On its face, such a determination is constitutionally invalid as not comporting with the basic requirements of due process. Before Rule 11 findings are made or imposed there must be notice and an opportunity to respond. *Roadway Express, Inc.*, v. *Piper, supra* at 767 ("sanctions" "should not be assessed lightly or *without fair notice and an opportunity for a hearing on the record*"). The due process violation is magnified by the fact that the Rule 11 determination was made against the petitioners for their *counsel's* conduct. *Pavelic & LeFlore* v. *Marvel Entertainment, supra*, 110 S.Ct. at 459 (the "consequences of signature run as to him").

Although it is true that the district court's Rule 11 determination was not a finding but a "recommendation," to the *Anderson* (II) court this is a distinction without a difference. The court treated the Rule 11 recommendation as if it was a finding, reversible only for an abuse of discretion. The due process issue concerns the denial of petitioners' right to respond to the charges *in the first instance* and not for the first time on appeal. The two are not the same.

Moreover, the fact that petitioners could give the due process issue limited treatment in their response to the district court's recommendations should not have been a reason for the court in *Anderson* (II) to dismiss the issue. In the limited number of pages (25) petitioners were allowed to relate to the court the complex proceedings and voluminous record of the remand proceeding, they succinctly but clearly brought to the Court's attention their argument that the Rule 11 determination was unjust in part because it came after the proceedings were over "out of the blue." The procedural injustice of denying petitioners due process is so fundamental, its impact on the Rule 11 issue so determinative, and the record of its occurrence so patent, that under well recognized appellate principles the issue merits action by this court irrespective of the sufficiency of petitioners' initial argument regarding it. *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. ___, ___, 109 S.Ct. 2909, 2921 (1989).

The use of petitioners' pre-trial private investigation file was improper. The district court should not have reviewed the file *in camera* or used its review as the basis for finding that petitioners' counsel violated Rule 11, and that petitioners were therefore undeserving of relief or sanctions for Beatrice's deliberate misconduct. The issue on remand was not petitioners' or their attorney's conduct but Beatrice's misconduct. The issue was not what petitioners did in ignorance, but what might have been done absent Beatrice's misconduct. The issue on remand was, in the words of the Court in *Anderson* (I), "where the suppressed information might plausibly have led." (A.42a). The trial court recognized this during the remand proceeding when it ordered the production of petitioners' investigative report. In explaining why it wished to examine petitioners' file the trial court stated "what frankly concerns me, and *it's the only reason it would be relevant*," is "*whether or not you did have something beyond guesswork and surmise*," concerning the tannery, because "if you had comparable information [to the concealed information] . . . that would be quite relevant on the question of whether there was interference" "if you have what you need to make the shot and don't shoot, that's the end of it." (A. 226a-227a). Instead the court used the file as a basis for concluding that petitioners had insufficient evidence to prosecute their tannery claims and were therefore not entitled to Rule 60(b)(3) relief (A. 77a-78a, 88a). Clearly, petitioners' claim for relief was doomed no matter what the file contained.

Had the district court given petitioners an opportunity to respond to the charges, petitioners could have shown that nothing in the private investigation file supported a Rule 11 charge. Quite the contrary, the file provided more than sufficient reason to believe that the tannery was dirty and that the tannery had used and allowed others to use the 15 acres as a dumpsite for chemical waste.

The district court's reference to the witnesses who did not know, remember, or want to provide information about the tannery's chemical use or disposal practices to support its charge that "counsel knew that there was no available competent evidence" concerning "the disposal of complaint chemicals by the defendant" is not fair (A. 84a). The district court failed to point to the numerous witnesses

that provided positive information and leads concerning the tannery's chemical use and disposal practices. It was petitioners' pre-trial investigation that developed the information presented at trial that the tannery dumped its waste on the side of the hill which drained down to the 15 acres — waste that contained high levels of the complaint chemicals, waste that petitioners' expert testified was tannery waste, waste that had been secretly removed by the tannery and its removal falsely denied (A. 49a-52a, 80a-87a, 126a-131a).

The district court's use of an excerpt from the file that the investigation "did not uncover evidence that the tannery had been using chlorinated solvents *in addition to those already acknowledged* by John J. Riley, Jr." and its observation that the investigation was "thorough and well-documented" (A. 81a-82a) to support the charge that therefore there was "no evidence" of complaint chemical use or disposal was both illogical and untrue. The investigator was not informing counsel that there was no complaint chemical use by the tannery, only that he could not obtain information regarding complaint chemical use *in addition* to that already admitted. As thorough as the investigation was, it did not uncover the existence of the Yankee or GEI investigations, the hundreds of other concealed documents, the numerous secret removal activities that had been concealed by Beatrice and Riley, and the numerous fact witnesses identified during the remand proceedings. Does that mean that these did not exist?

It was equally unfair of the district court to use the excerpt from the investigator's report to suggest that there was no tannery disposal case. The excerpt selected by the district court was from the summary of the investigation concerning "*Dumping by Riley tannery*" and the evidence that "*as far back as the mid-1950's, the tannery disposed of potentially toxic sludge on the 15 acre site.*" This information coupled with the discovery on the 15 acres of chemical waste that test results and petitioner's expert connected to the tannery was more than sufficient to justify pursuit of the theory that the tannery contributed to the contamination of the city wells.

Neither what the district court selected nor what it chose to ignore supports its charge that petitioners' counsel did not have a basis to

believe that the tannery was involved in the contamination of the 15 acres or that the tannery was itself contaminated. Almost every piece of evidence that has come to light since the discovery of the concealment of the Yankee and GEI investigations and reports supports petitioners' theory that the tannery contributed to the pollution of wells G and H. The theory becomes that much more compelling when consideration is given Beatrice's intense efforts to conceal and destroy that evidence. In these circumstances it is the district court's determination that such a basis did not exist which is without foundation, not petitioners' belief that such a basis did exist.

III. *Anderson* (II) Leaves Unaddressed an Ongoing Fraud on the Court.

The Court's decision in *Anderson* (II) leaves unrecognized, unexamined, and unremedied an ongoing fraud on the court. The decision completely ignores the district court's finding that the remand proceeding was itself the subject of the fraudulent concealment of critical information by Beatrice. It completely ignores the fact that the fraudulent concealment during the remand proceeding was executed not only by Beatrice but also by its attorneys — officers of the Court. It fails to consider that the information concealed from the court during the remand proceeding was of such fundamental relevance to the court's mandate that the findings and recommendations denying petitioners' relief or sanctions made by the district court in the absence of the information, must be ruled invalid.

The failure to acknowledge, inquire, or remedy the "strategic concealment" of Beatrice's knowledge and involvement in discovery misconduct directly contravened the Court's remand instruction in *Anderson* (I) that "this aspect of the matter merits aggressive inquiry on remand." (A. 35a). The court had ordered such inquiry because Beatrice's knowledge and involvement in Riley's "cover up" would have affected its "bona fides" (A. 35a).

In light of the Court's mandate in *Anderson* (I) to get to the bottom of things, how can its silence in *Anderson* (II) be justified in the face of the revelations by attorneys Ryan and Fishman that Beatrice was

not only a knowing party to the discovery misconduct but the major force behind it? At the very least, such revelations demanded inquiry.

The failure of the district court and the Court in *Anderson* (II) to address Beatrice's admitted and found fraud and to determine its nature and extent requires this court to exercise its supervisory power and review this matter. See Rule 10 of the United States Supreme Court. Such action is imperative to ensure the integrity of the judicial process. Fraud on the court "is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud *cannot* complacently be tolerated consistently with the good order of society." *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 246 (1944).

It is truly unfortunate that the lower courts' inaction in this matter has necessitated petitioners' request. Yet, it is the lower courts' failure to take action against Beatrice's and its attorneys' open contempt for their obligations to deal fairly with petitioners and honestly with the court, which most eloquently speaks for action by this court. Such action is just and best insures against a recurrence of the abusive conduct. See, *Roadway Express, Inc.* v. *Piper*, *supra* at 763-64 citing *National Hockey League* v. *Metropolitan Hockey Club*, *supra* at 643 (sanctions for abuse of the judicial process "must be applied diligently both 'to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent' "). Silence can only encourage repetition.

CONCLUSION

The *Anderson* (II) opinion must be reviewed by this court. Beatrice's deliberate abuse of the judicial system should not go unremedied. Petitioners' counsel should not be subjected to an unfair finding concerning his conduct in the case. Petitioners should not be deprived fundamental justice based on legally improper and factually unfounded rulings.

For these reasons, petitioners respectfully request that this court grant their petition.

Respectfully submitted,

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Appendix

APPENDIX A.

Anne ANDERSON, et al.,
Plaintiffs-Appellants,

v.

CRYOVAC, INC., et al.,
Defendants-Appellees.

Anne ANDERSON, et al.,
Plaintiffs, Appellants,

v.

BEATRICE FOODS CO.,
Defendant, Appellee.

Nos. 87-1405, 88-1070.

United States Court of Appeals,
First Circuit.

Heard July 28, 1988.

Decided Dec. 7, 1988.

As Amended Dec. 22, 1988.

An action was brought seeking to recover for personal injuries allegedly sustained by contamination of municipal water wells by toxic solvents. Following directed verdict for defendants on certain issues, jury made answers to special interrogatories adverse to plaintiffs, and plaintiffs appealed, and also appealed the later denial by the United States District Court for

the District of Massachusetts, Walter Jay Skinner, J., of motion for relief from judgment. The Court of Appeals, Selya, Circuit Judge, held that: (1) District Court properly made finding on issue which was omitted from special interrogatory with acquiescence of plaintiffs; (2) failure to disclose or produce materials requested in discovery can constitute "misconduct" for purposes of relief from judgment even if omission is accidental; (3) to warrant relief, the misconduct must substantially have interfered with the aggrieved party's ability fully and fairly to prepare for and proceed at trial; (4) rebuttable presumption of damage to aggrieved party arises if concealment was knowing and purposeful; (5) absent knowing and deliberate misconduct, movant must prove by a preponderance of the evidence that nondisclosure worked some substantial interference with its preparation or presentation; (6) nondisclosure of a certain report in the instant case constituted misconduct; and (7) trial court abused its discretion in refusing to make inquiries as to defense counsel's rationale for withholding the report, and then making findings of fact on the very matters which inquiry could reasonably have been expected to illuminate.

Appeal from judgment denied and dismissed; jurisdiction retained on appeal from denial of motion, and remanded with directions.

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Before BOWNES, TORRUELLA and SELYA, Circuit Judges.

SELYA, Circuit Judge.

Although we disagree with appellants' characterization of the matter before us as a watershed in the law of toxic torts,[1] we find these consolidated appeals to raise perplexing questions — some of novel impression -- concerning the scope and operation of certain of the Civil Rules. An exposition of the questions squarely presented, and of our answers to them, follows.

I. THE UNDERLYING LITIGATION

We eschew an exigetic presentation of the litigation's history, secure in the knowledge that the reader with a thirst for further detail may appropriately consult two published table-setter opinions: *Anderson* v. *Cryovac, Inc.*, 96 F.R.D. 431 (D. Mass. 1983) (*Anderson I*) and *Anderson* v. *W.R. Grace & Co.*, 628 F.Supp. 1219 (D. Mass. 1986) (*Anderson II*). Rather, we address the facts only insofar as they pertain directly to the issues which confront us.

In 1964, the Commonwealth of Massachusetts and the city of Woburn approved plans to site two municipal water wells, designated "G" and "H," in the Aberjona River Valley. The wells were installed. In 1979, public health officials discovered that the wells were contaminated by toxic solvents. These solvents included trichloroethylene, tetrachloroethylene, 1,2 transdichloroethylene, and trichloroethane. For ease in reference, we shall call them, collectively, the "complaint chemicals." After much investigation, officials of the federal Envi-

[1] Our review of the 78-day trial record reveals that most of the substantive issues thought originally to be implicated were rendered moot by the jury verdict, by the trial judge's findings of fact, by procedural default, or by some combination of the three. Despite the interesting nature of certain of the legal problems, and their undeniable importance in the abstract, we lack any commission to reach them purely for their own sake.

ronmental Protection Agency (EPA) zeroed in on several potential sources of contamination; a manufacturing plant owned by W.R. Grace & Company (Grace), situated northeast of the wells; premises controlled by Unifirst Company, located north of the wells; and a 15-acre parcel of vacant wetland lying west and southwest of the wells. This parcel is a cynosure of the case.

The 15 acres were bordered by the Aberjona River on the east, a railroad embankment on the west, and a facility operated by a trucking company on the north. South of the parcel were a trio of businesses: Aberjona Auto Parts, Murphy Waste Oil, and Whitney Barrel Co. To the southwest, across a set of railroad tracks, lay a tannery which had been operated by the John J. Riley Company (Rileyco). In 1951, Rileyco — then owned and operated by the Riley family — purchased the 15 acres from the city and installed a production well on the site. In December 1978, the tannery became a division of defendant-appellee Beatrice Foods Company (Beatrice). Under the terms of the acquisition agreement, Beatrice obtained the business and real estate and assumed Rileyco's environmental liabilities. John J. Riley, Jr. (Riley) stayed on as the division's chief operating officer. In January of 1983, Beatrice resold the main tannery property. Riley resumed his proprietary operation of the tanning business under the Rileyco name. Simultaneously, the 15-acre wetland was transferred to an entity bearing the elegant name "Wildwood Conservation Corporation" (Wildwood). Like the "new" Rileyco, Wildwood was controlled by Riley.

Plaintiffs (appellants before us) all lived near wells G and H during and prior to 1979. In 1982, they sued Grace, Beatrice, and others in a Massachusetts state court, alleging that complaint chemicals in the water supply had caused them to contract a variety of ailments, leukemia included. Their action was based upon common law tort theories of negligence, nuisance, and strict liability. Because diversity jurisdiction existed, Grace

and Beatrice were able to remove the case to federal district court. After several years, trial approached. The district court — confronted with a behemoth of a case — opted to try the matter in three stages. In the first phase, the jury would determine whether defendants were responsible for polluting the wells. The second and third phases, if needed, would be devoted to causation and damages, respectively. A 78-day first-phase trial ensued. Fifty-three days along, at the end of plaintiffs' case in chief, defendants moved for directed verdicts. In a written memorandum and order, the district judge ruled, inter alia:

(1) As to any negligence claim against Beatrice, the jury could only consider conduct occurring after August 27, 1968 (the date when Rileyco, Beatrice's predecessor in interest, first had arguable notice that wastes on the 15 acres could affect the municipal water supply). *Anderson* v. *W.R. Grace & Co.*, Civ. No. 82-1672-S, slip op. at 2-3 (D.Mass. June 9, 1986) (*Anderson III*).

(2) The jury could not consider failure to warn as evidence of Beatrice's negligence, because plaintiffs had not shown the existence of a special relationship that would support the imposition of such a duty. *Id.* at 3.

(3) The jury could not consider the strict liability claim against Beatrice, because there was no evidence of purposeful contamination. *Id.* at 3-4.

These rulings, coupled with other rulings vis-a-vis Grace (which we need not discuss), hampered plaintiffs to some extent, but did not extinguish their claims. The defendants' case went forward. When the evidence was closed, the court and the parties spent the best part of three days conferring over proposed jury instructions and related matters. The jury ultimately received the case on eight special interrogatories, four of which concerned Beatrice's liability. The first read as follows:

1. Have the plaintiffs established by a preponderance of the evidence that any of the following chemicals were disposed of at the Beatrice site after August 27, 1968 *and* substantially contributed to the contamination of Wells G and H by these chemicals prior to May 22, 1979?

(a) Trichloroethylene Yes ____ No ____
(b) Tetrachloroethylene Yes ____ No ____
(c) 1,2 Transdichloroethylene Yes ____ No ____
(d) 1,1,1 Trichloroethane Yes ____ No ____

The jury answered in the negative as to each chemical and, in accordance with the court's instructions, went no further as to Beatrice.[2] Appellee sought immediate entry of judgment. Fed.R.Civ.P. 54(b), but plaintiffs objected. They argued that yet another question should be propounded to the jury. The district judge made certain findings under Fed.R.Civ.P. 49(a),[3] rebuffed plaintiffs' overture, and entered the requested judgment. *Anderson* v. *Beatrice Foods Co.*, No. 82-1672-S, memorandum and order (D.Mass. Sept. 17, 1986) (*Anderson IV*). Plaintiffs prosecuted an appeal (No. 87-1405).

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[2] The jury found the codefendant, Grace, liable for contaminating the wells with trichloroethylene and tetrachloroethylene. On September 17, 1986, Judge Skinner ordered a new trial as to Grace, in effect vacating the first-phase verdict as to it. No matters pertaining to Grace are currently before us.

[3] The rule states in relevant part:

> The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer. . . . The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Fed.R.Civ.P 49(a).

Soon thereafter, a new cloud darkened the horizon: plaintiffs essayed a further appeal from the district court's denial of a Rule 60(b) filing (No. 88-1070). The proceedings have been consolidated. We address them *seriatim*.

II. THE APPEAL FROM THE VERDICT

On their first appeal, plaintiffs argue that they deserve a new trial because the district court improperly foreclosed jury consideration of various legal theorems. We find it necessary to reach all of plaintiffs' substantive points, however, because the jury's answers to the special interrogatory, combined with the factual findings supportably made by the district judge under Fed.R.Civ.P. 49(a), fully disposed of plaintiffs' claims against Beatrice. Error as to peripheral matters — and we do not suggest that any occurred — was therefore harmless.

We approach this facet of our inquiry by looking to Fed.R. Civ.P. 49(a), *see supra* note 3, and to the standard of review applicable to the district court's findings thereunder. We then examine the findings and assess their legal adequacy and effect.

A. *Special Verdicts: A Perspective.*

At common law, special verdicts could not support a judgment unless the jury made findings of fact on every material issue in the case. *E.g., Graham v. Bayne*, 59 U.S. (18 How.) 60, 63, 15 L.Ed. 265 (1855). Waiver was not presumed: omission from the interrogatories of a fact necessary to support the judgment — even if the fact had been conceded — constituted grounds for reversal. *See Hodges v. Easton*, 106 U.S. (16 Otto) 408, 412, 1 S.Ct. 307 (1883); *see also* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2507 (1971). These barriers marked a thinly-veiled distrust of jury interrogatories and deprived special verdicts of many of their natural advantages. Consequently, end-of-trial interrogatories were seldom seen.

The adoption of the Civil Rules put an end to this desuetude. Rule 49 recognized the value of the special verdict, judiciously employed. At the rule's core lay the policy of honoring special verdicts rendered upon agreed questions. In contrast to former practice, Rule 49 "put[ ] the burden of securing a jury verdict on all of the issues squarely on the parties." *Id.* at 505. Efficacious use of the new modality demanded, of course, that the nisi prius court be permitted to make interstitial findings of fact. To this end, Rule 49(a) ensures that, if the submitted questions omit any material issue of fact, the district court may itself make a finding (or, if it fails to do so, shall be deemed to have made a finding) consistent with the judgment entered pursuant to the special verdict. *See Graphic Products Distributors, Inc. v. ITEK Corp.*, 717 F.2d 1560, 1569 (11th Cir. 1983); *Guidry v. Kem Manufacturing Co.*, 598 F.2d 402, 406 (5th Cir. 1979), *cert. denied*, 445 U.S. 929, 100 S.Ct. 1318, 63 L.Ed.2d 763 (1980). The net result is that the rule invests the trial judge with extensive powers to resolve issues which should have been — but were not — covered by the interrogatories. *See, e.g., Goeken v. Kay*, 751 F.2d 469, 474 (1st Cir. 1985) (in contract case, Rule 49(a) allowed district court to determine nature of contract for purpose of statute of frauds, where issue was omitted from jury interrogatories); *Brenham v. Southern Pacific Company*, 328 F.Supp. 119, 123 (W.D.La. 1971) (where negligence submitted to jury, but not proximate cause, district court could find causation, using Rule 49(a)), *aff'd*, 409 F.2d 1095 (5th Cir.), *cert. denied*, 409 U.S. 1061, 93 S.Ct. 560, 34 L.Ed.2d 513 (1972); *Diffenderfer v. Heublein, Inc.*, 285 F.Supp. 9, 11 (D.Minn. 1968) (district court could make findings on omitted issues in contract action, including waiver, duress, ratification, and applicability of statute of frauds), *aff'd*, 412 F.2d 184 (8th Cir. 1969). By the time this litigation loomed on the horizon, the wisdom of the ancient maxim "*oportet quod certa res deducatur in judicium*" had

gained widespread appreciation; jury interrogatories had become a frequently-used tool, much valued in the bargain; and the power of federal district judges to make supplementary findings of fact on omitted issues in Rule 49(a) cases was accepted as a necessary adjunct of the process.

B. *Standard of Review.*

The type of oversight which pertains to a trial judge's Rule 49(a) findings has not been stated definitively in this circuit. *See Goeken v. Kay*, 751 F.2d at 472; *cf. Payton v. Abbott Labs*, 780 F.2d 147, 154 (1st Cir. 1985) (district court's finding under Rule 49(a) reversed as "clearly erroneous" without discussion of standard). This appeal, we believe, requires us to select an approach.

[1] The problem has two aspects. In the first place, questions such as whether a particular fact was omitted, or if omitted, was material to the submitted issue, are legal in nature and call for plenary review. *Cf. United States v. Rodriguez*, 858 F.2d 809, 812 (1st Cir. 1988) (adopting plenary standard of appellate review to determination of whether evidence supports request for charge). But once such threshold matters are resolved, a different test is needed. Where, as in this case, a material fact was indeed omitted, the judge must indulge in differential factfinding in an environment dominated by the text of Rule 49. The right to have a jury find the further facts is not snatched from unsuspecting litigants. To the contrary, the rule clearly admonishes parties that jury trial will be waived as to any issues not submitted. Jury access is lost only through a party's failure seasonably to have demanded submission of an omitted issue, that is, when a litigant acquiesces in an omission or neglects to object to the verdict form at a time when error may be easily corrected. *See, e.g., Reo Industries, Inc. v. Pangaea Resource Corp.*, 800 F.2d 498, 500 (5th Cir. 1986); *Cote v. Estate of Butler*, 518 F.2d 157, 160 (2d Cir.

1975). Consequently, there is every reason to treat the district court's Rule 49 findings of fact in the same manner as findings of fact made after a bench trial, reviewable under the "clearly erroneous" standard of Fed.R.Civ.P. 52(a). We so hold. *Accord J.C. Motor Lines, Inc. v. Trailways Bus System*, 689 F.2d 599, 602 (5th Cir. 1982). This means, in turn, that:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer City, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985).

C. *The District Court's Findings.*

In this case, the district court made post-verdict findings on an omitted issue. In the court's words:

> The plaintiffs argue that [judgment should not enter for Beatrice because] a pertinent issue of fact was omitted from the interrogatories to the jury, namely, whether *any* of the contaminating chemicals from the Beatrice site reached the wells. . . .
> *I find that it has not been established by a preponderance of the evidence that any contaminant from the Beatrice site reached the wells.* [Plaintiff's evidence] was seriously flawed in this respect by [the expert's] failure to account for loss of water from the river during pumping. I accept [another expert's] testi-

> mony that the gradient differentials were too insubstantial to form the basis of an opinion. Under the rules placing the burden of proof on the plaintiffs, I am obliged to find against the plaintiffs on this point.

Anderson IV, slip op. at 7 (emphasis supplied). This finding, if supportable, ends plaintiffs' case against Beatrice. To explain, we turn first to the propriety of the paralipomena. In so doing, we consider whether a material issue was omitted from the jury interrogatories, and, if so, whether appellants acquiesced in the omission. Because we find such an oversight occurred, we treat with its significance. Next, we scrutinize the underpinnings of the district court's Rule 49(a) findings. Finally, we assess the effect of the findings on the balance of plaintiffs' case.

1. *Omission of the Flowage Issue*. Groundwater movement was a major topic of the trial. Yet the interrogatories did not ask the jury to make specific factual findings as to the direction of flow. Rather, the first interrogatory — the only one germane to this inquiry — addressed two other points: (1) whether there had been disposal of complaint chemicals on the 15 acres after 1968; and (2) whether complaint chemicals had travelled from there to wells G and H. *See supra* at 914 [see 6a]. Submission of the latter issue would ordinarily have required the jury to make a determination on groundwater flow. But because of the compound and conjunctive nature of the question, the jury's negative answers — there were four, one for each of the complaint chemicals — were arguably ambiguous. The responses could be read to mean *either* that there had been no disposal after 1968, *or* that no chemicals had travelled to the wells. And there was yet a third possibility: the "no" answers could have meant that the jury felt *both* prongs of the interrogatory remained unproven. In light of this unmistakable potential

for amphiboly, the issue of groundwater flow was seemingly "omitted" from the special verdict within the meaning of Rule 49(a).

Appellants tell us that the issue cannot be deemed "omitted" because the district court exceeded its power by resolving a question on which appellants had not waived their right to jury trial, *viz.*, the question of whether contamination was caused by disposal of complaint chemicals on the 15-acre site *before* August, 1968. Plaintiffs are correct, in part. The issue of pre-1968 pollution had been removed from the jury's consideration by the directed verdict, *see supra* at 914 [see 5a], and was preserved for appeal by proper objection in that context. Inasmuch as the omission of pre-1968 pollution from the interrogatory stemmed from that ruling, no waiver can be charged to plaintiffs' account on that score. Our inquiry, then, must proceed along a narrow track: if plaintiffs acquiesced in the omission of the flowage issue from the interrogatory, the court below was entitled to find the facts anent groundwater dynamics, *cf. Goeken v. Kay*, 751 F.2d at 474, but not to resolve the issue of pre-1968 pollution.

[2] 2. *Acquiescence*. That there was acquiescence is beyond peradventure. The phrasing of the interrogatory was debated extensively at the 3-day charge conference. The court offered a draft interrogatory which, like the one finally adopted, wrapped the issues of disposal and travel into a unitary package. Beatrice's counsel opposed this formulation, arguing that it was "drafted in a way . . . that creates more confusion" for the jury. Trial Transcript (T) 75:24. He suggested breaking out post-1968 disposal as a separate question, *id.* at 25-26, and pointed out that the proposed interrogatory was "compound." *Id.* at 27. Plaintiffs, though aware of the question's obvious importance, objected to appellee's suggested revisions, told the judge that the question was "fine the way it is phrased," T. 75:26, and encouraged the court to adopt it in pre-

cisely the form submitted to the jury. This, we think, was not merely passive acquiescence (though that would be enough); appellants' actions amounted to active advocacy of the faulty phraseology. To drive the final nail, we note that when the judge, following the charge, asked for objections at sidebar, plaintiffs' counsel registered no opposition to the interrogatory.

It is well settled that a litigant who accedes to the form of a special interrogatory will not be heard to complain after the fact. *See J.C. Motor Lines, Inc.*, 689 F.2d at 603; *Frankel v. Burke's Excavating, Inc.*, 397 F.2d 167, 170 (3d Cir. 1968); *Wyoming Construction Co. v. Western Casualty and Surety Co.*, 275 F.2d 97, 104 (10th Cir.), *cert. denied*, 362 U.S. 976, 80 S.Ct. 1061, 4 L.Ed.2d 1011 (1960); *see also* 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 49.03[2] (2d ed. 1988) at 49-17. If a slip has been made, the parties detrimentally affected must act expeditiously to cure it, not lie in wait and ask for another trial when matters turn out not to their liking. *See Nimrod v. Sylvester*, 369 F.2d 870, 873 (1st Cir. 1966) (plaintiff who sat by when court neglected to answer jury request for supplementary instruction could not complain on appeal; lack of awareness was "of [counsel's] own making"). In this instance, we think it clear that plaintiffs waived any objection as to the interrogatory's form. *Accord Central Progressive Bank v. Fireman's Fund Insurance Co.*, 658 F.2d 377, 381-82 (5th Cir. 1981) (by failing to protest before jury discharged, party waived objection to interrogatory that, in retrospect, submitted question of law due to conjunctive phrasing). Especially where, as here, plaintiffs bear a lion's share of the responsibility for the infelicitous phrasing, they ought not to be allowed to base an appeal on the ambiguities and omissions that were the natural consequence of their strategy. As we have stated in an analogous setting, to hold otherwise "would place a premium on agreeable acquiescence to perceivable error as a weapon of appellate advocacy." *Merchant v. Ruhle*, 740 F.2d 86, 92 (1st Cir. 1984).

[3] 3. *Pre-1968 Pollution.* We do not believe that preservation of the claimed error referable to pre-1968 contamination saved the plaintiffs' bacon. The district court's finding on the omitted issue concerned the nature and direction of groundwater flow, a matter altogether separate and distinct from whether waste disposal took place on the 15-acre site in or before 1968. Groundwater flow, unlike the occurrence of pre-1968 disposal, was not directed out of the case by the judge's earlier ruling. The reverse is true; the issue was fully tried. Testimony was taken from no fewer than three experts. The absence of a definite jury finding as to groundwater flow was due solely to compound phrasing of the interrogatory, and bore no relationship to the directed verdict. Inasmuch as plaintiffs accepted and endorsed the interrogatory as submitted, they cannot now complain that they were caught in its toils.

Because the point is significant, we digress for a moment to explicate in greater detail why a directed verdict on waste disposal did not preclude a Rule 49(a) finding on groundwater flow. The key is that the relevant hydrogeological characteristics were constant from the pre-1968 period to the post-1968 period; thus, the critical hydrogeological factors would have remained the same whether or not dumping was allowed on the 15 acres during the early years. Indeed, plaintiffs' hydrology expert, Dr. Pinder, so testified. *E.g.*, T. 42:114. Inevitably, a finding on post-1968 groundwater flow would have to be accorded probative force in the earlier time frame. If, as the district court found, it was impossible to determine whether any "contaminant from the Beatrice site reached the wells," then befoulment of the 15 acres, whether before or after 1968, made not the slightest difference. Plaintiffs' complaint, after all, was not that the land had been defiled, but that the defilement had poisoned the wells, thereby inflicting harm. Given this set of circumstances, it is unnecessary to decide whether the evidence of pre-1968 disposal was sufficient to warrant jury

submission. *Compare Frankel*, 397 F.2d at 169 (no need to review evidentiary ruling because evidence did not relate to issued placed before the jury by answered interrogatory; jury's negative answer thereto was dispositive of case, rendering evidentiary question academic).

Not easily daunted, appellants asseverate that, if this be so, the finding on groundwater floor was all the more improper, because it effectively mooted plaintiffs' appeal of the directed verdict on pre-1968 disposal.[4] This contention, despite its superficial appeal, is mere heuristic. Preservation of the right to appeal an issue, or the right to a jury trial on it, imports no guarantee that the issue will prove determinative or even relevant. The set-aside issue remains subject to the logical force of other findings by the judge and jury. Those findings may well obviate the need to consider the issue; yet, if they are neither erroneous nor improperly influenced by the set-aside, there is no paradigmatic flaw in according them dispositive effect. Take, for example, a ruling directing a verdict in favor of a putative tortfeasor on an element of damages (say, emotional distress). If the jury finds for the plaintiff and awards other damages (*e.g.*, lost wages, medical expenses), plaintiff can appeal the ruling which blocked recovery for psychic harm. But if the jury finds for the defendant on liability, few would dispute that claimant's right to have the emotional distress ruling reviewed has been short-circuited. When all is said and done, a federal appellate court ought not to scratch an intellectual itch, no matter how tantalizing the problem, unless something turns on it.

[4]. We note, too, that the district court's Rule 49(a) finding on groundwater dynamics was entirely consistent with the jury verdict. At trial, the parties assumed that a negative answer

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[4] Appellants' further assertion that the district judge made a Rule 49(a) finding on groundwater flow solely to insulate his other rulings from appeal derives entirely from speculation — and mean-spirited speculation at that. The attack deserves no analysis.

to the first interrogatory would dispose of the case against Beatrice. The jury was so instructed, and was told that it would have to reach such an answer it if accepted the testimony of defendants' hydrogeology experts. Appellants did not object. By answering the four-part interrogatory with an unbroken skein of "noes,", the jury exonerated appellee. Thereafter, the judge performed his Rule 49(a) role by making an explicit determination concerning groundwater flow — a finding which was omitted from, but likely implicit in, the verdict. This is exactly the sort of function which the rule was designed to serve. *See, e.g., Guidry v. Kem Manufacturing Co.*, 598 F.2d at 406 (rule sidesteps hazard of "verdict remain[ing] incomplete and indecisive" because jury did not "decide every element of recovery or defense"); *cf. Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 119, 83 S.Ct. 659, 666, 9 L.Ed.2d 618 (1963) (discussing duty of court to harmonize jury's answers to special interrogatories, if possible).

The caselaw relied upon in appellants' scholarly brief does not in any sense require a contrary result. We see no need to examine those authorities at great length. Appellants' leading case is *In re Randall*, 712 F.2d 1275 (8th Cir.1983). There, the district court directed a verdict for defendant on a negligence count. After reversal on appeal, 677 F.2d 1226 (8th Cir.1982), the judge invoked Rule 49(a) and made a finding in defendant's favor on the issue of proximate cause. The Eighth Circuit again reversed, believing it "erroneous to say that the parties had waived their right to a jury trial on the issue of proximate cause under the negligence count. The negligence count was withdrawn from the jury by the trial judge." 712 F.2d at 1277. We agree. Having agreed, however, we come full circle: the *Randall* rule would apply here if the trial court had made a Rule 49(a) determination on the same issue which had been directed out of the case, that is, the issue of pre-1968 pollution. Be that as it may, the actual finding

below was of a different breed, made on the discrete issue of groundwater dynamics. *Randall* is, therefore, inapposite.

Our own case of *Payton v. Abbott Labs, supra*, is cut from much the same cloth. There, we stated that Rule 49(a) "gives the district court the authority to make a finding on the omitted question of fact; it does not give it the right to substitute its judgment for that of the jury on [a] question. . . ." 780 F.2d at 154. That is so. But here, faithful to the *Payton* admonition, the district court did not displace the jury; it merely filled a gap left open by the verdict. *Palmiero v. Spada Distributing Co.*, 217 F.2d 561 (9th Cir.1954), another of plaintiffs' stable of cases, is distressingly far afield. *Palmiero* held that Rule 49(a) findings were not valid where the attorneys failed to object because they were "led astray and led to believe that the interrogatories submitted to the jury would cover all the substantial issues of fact." *Id.* at 565. Unlike the instant case — where the judge was frank and forthcoming and where plaintiffs had seen and endorsed the special verdict form — the judge in *Palmiero* made certain representations as to the intended language, but then "did not carry out what counsel were justified in believing was meant." *Id.* Nothing resembling that unhappy scenario is reflected in this record.

[5] 4. *Weight of the Evidence.*[5] As discussed *supra*, it is readily evident that the district judge was within the pale in invoking Rule 49(a) and making a specific finding on the omitted issue of groundwater flow. Notwithstanding, it remains for us to consider whether, viewing the record as a whole, the finding was clearly erroneous. We limn the pertinent testimony.

Dr. Guswa, Grace's hydrogeology expert, testified that several factors made it impossible to draw a firm conclusion as to whether wells G and H drew water from the 15-acre wetland. Groundwater movement in the area was determined in part by the pumping of two wells used by the Rileyco operation (one on the 15 acres, one on the nearby tannery property). Pumping

[5] The term has, perhaps, a special significance in this case. The trial record and the appendices, in the aggregate, weigh in the vicinity of 150 pounds.

of the tannery well, and of wells G and H, undeniably created barriers to groundwater flow, but the location of these barriers could not be determined with any degree of certainty. To complicate matters further, no pumping records existed for the tannery wells. Furthermore, the topography itself presented an obstacle to authoritative resolution of the question. The wetland was essentially flat, with a gradient of approximately 1/1000th of a foot. Due to shortcomings in available techniques, water level measurements on the site varied significantly. This was of considerable moment; for an estimate of groundwater flow direction to be meaningful, the precision of the measurements would have to surpass the natural gradient. Given the tiny gradient present here, uncertainties in the metage of water levels likely concealed the true direction of groundwater flow. In other words, from a theoretical viewpoint, seemingly small discrepancies in water level mensuration could reverse the model's result for groundwater direction vis-a-vis the wetland; and from a practical viewpoint, as Dr. Guswa opined, the error in measurement would exceed the gradient on the 15 acres.

For these reasons, plaintiffs' conclusions as to groundwater flow on the 15-acre wetland were, in Dr. Guswa's view, inherently unreliable. Taking into account the limitations on physical, scientific, and historical data, the expert affirmed that it was a matter of "garbage in, garbage out". T. 69:26; *see also id.* at 31. He also testified that half the water pumped by wells G and H was drawn from the Aberjona River, making it a primary source of the complaint chemicals which contaminated the wells. This opinion made considerable sense when paired with United States Geological Service tests showing that the flow of the Aberjona decreased markedly when the wells were pumping. To be sure, plaintiffs' expert (Dr. Pinder) maintained that the bottom of the river was relatively impermeable. He speculated that it would take a decade or more after well G began to pump before *any* water from the Aberjona was drawn

to, and pumped from, the well. Especially in light of the pump-test evidence, the district court was justified in preferring Dr. Guswa's testimony to that of Dr. Pinder. Such choices, after all, comprise precisely the sort of differential fact-finding that the Civil Rules contemplate.[6]

We need ride this horse no further. Having carefully reviewed the voluminous record, we can state with assurance that the Guswa testimony, taken as a whole and in appropriate context, was neither inherently improbable nor overbalanced by the convictive force of any conflicting evidence. The district court, we think, was entitled to credit it. As we have consistently held, once expert testimony on a point is properly admitted, it is normally the prerogative of the factfinder "to determine the weight and value to be accorded to [it]." *Allied Int'l, Inc. v. Int'l Longshoremen's Ass'n*, 814 F.2d 32, 40 (1st Cir.), *cert. denied*, ___ U.S. ___, 108 S.Ct. 79, 98 L.Ed.2d 41 (1987). Such a determination having been made, we have no brief to interfere: "Where the conclusions of the [trier] depend on its election among conflicting facts or its choice of which competing inferences to draw from undisputed basic facts, appellate courts should defer to such fact-intensive findings, absent clear error." *Irons v. FBI*, 811 F.2d 681, 684 (1st Cir.

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[6] Appellants repeatedly allude to testimony in which Dr. Guswa is supposed to have declared that the 15 acres were a probable water source for wells G and H. *See* T. 69:43-44; 70:105-06. A close reading of the record, however, convinces us that Dr. Guswa's remarks, taken in context, cannot carry the cargo which appellants seek to ship. The witness did say that areas "northeast and west" of the wells were a "probable source," but never referred specifically to the 15 acres within that reference. He ultimately concluded that 50% of the water for wells G and H was drawn from the Aberjona River. He also concluded that 20-25% came from locations *east* of the wells. T. 71:56-58. The source of the remaining 25-30% of the water would be the aquifer coming from the north. T. 71:81. While the wells would pull some water from the marsh area on the west side of the river, no water would come from the drylands west of the railroad tracks. T. 71:82. When asked by the court whether water from the 15 acres would have reached wells G and H, Dr. Guswa said it was impossible to tell. T. 71:83. The judge was entitled to accept, and act upon, this explanation, and to find that plaintiffs did not carry the burden of proof.

1987); *see also Keyes v. Secretary of the Navy*, 853 F.2d 1016, 1027 (1st Cir.1988) (where there are "various permissible views of the proof . . . it [is] the district judge's prerogative, indeed, his duty, to choose among them").

D. *Effect of the Findings.*

Having determined that the trial court's findings under Rule 49(a) were properly made and supported, we must now assess their effect upon the balance of plaintiffs' case.

To prevail in tort, plaintiffs had to establish that (1) Beatrice contaminated or allowed others to contaminate the 15-acre parcel, (2) with complaint chemicals, (3) which travelled to Wells G and H, and (4) thereupon caused plaintiffs' injuries. The post-verdict findings snap the vital third link of this causal chain. If the uncertain nature and direction of groundwater flow makes it impossible to prove that complaint chemicals travelled from the wetland to the wells, then plaintiffs' illnesses cannot be tied to an act or omission of Beatrice. *See Dedham Water Co. v. Cumberland Farms, Inc.*, 689 F.Supp. 1223, 1224-27 (D.Mass.1988) (plaintiffs were required to prove by preponderance of evidence that contamination in wells had originated at defendant's facility), *notice of appeal filed* (1st Cir. Sept. 1, 1988). If we credit the lower court's determination that the complaint chemicals discovered in the wells had not been shown to have emigrated from the 15 acres, plaintiffs' tort claims are sunk.

[6] We note at the outset that the judge's factual findings render entirely moot appellants' contention that Beatrice had a duty to warn the public about hazards on its land and to remedy such hazards. The import of the court's findings could not be clearer: if it could not be shown that the 15-acre site was a source of complaint chemicals in the municipal drinking water, *a fortiori*, there existed no cognizable hazard that could be the subject of abatement. In other words, warning plaintiffs

about dangers inherent *on the site* would not have prevented the harm, since it was never established that chemicals travelled from the site to the wells. *See, e.g., Restatement (Second) of Torts* § 366 (1965) ("One who takes possession of land upon which there is an . . . artificial condition unreasonably dangerous to persons or property outside of the land is subject to liability for physical harm *caused to them by the condition*. . . .") (emphasis supplied); *Dedham Water Co. v. Cumberland Farms, Inc.*, 689 F.Supp. at 1226-26 & n.7 (common law theories in water pollution case require proof of underground transmission as causal nexus between defendant's conduct and plaintiff's injury). *Compare Carrier v. Riddell, Inc.*, 721 F.2d 867, 868 (1st Cir.1983). Moreover, because plaintiffs failed to prove the vital third link — a connection between defendant's conduct and spoliation of the water — we have no occasion to decide whether the district court was correct in holding that Beatrice had no duty to curtail its actions or to warn plaintiffs of them.

For much the same reasons, we have no occasion to pass upon plaintiffs' claim that the doctrine of strict liability should have been applied in the case. To be sure, the highest court of Massachusetts adopted the theory of strict liability in *Clark-Aiken Co. v. Cromwell-Wright Co.*, 367 Mass. 70, 323 N.E.2d 876 (1975). Nonetheless, the court cautioned that "if the plaintiff's damage does not directly result from the risk created, or is not a 'natural consequence' thereof, recovery will be denied." 323 N.E.2d at 887 n.21. That admonition bars this door: since appellants were unable to prove that chemicals migrated from the 15 acres to well G and H, it cannot be said that contamination of the water supply was a "natural consequence" of defendant's conduct.[7]

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[7] We express no opinion on the applicability of either strict liability or failure to warn, as a theoretical matter, to the facts of this action. Similarly, we consider only the causes of action properly pleaded and preserved by plaintiffs

Because the trial court's findings on groundwater flow were both plausible and adequately rooted in the record, *see supra* Part II(C), they were dispositive of the case on liability. Accordingly, plaintiffs' initial appeal, No. 87-1405, must be overruled.

III. THE UNDISCLOSED EVIDENCE AND THE ENSUING APPEAL

We now reach the second of the plaintiffs' two appeals, No. 88-1070. During the pendency of the original appeal, certain previously undisclosed evidence surfaced. Plaintiffs learned serendipitously that Riley had commissioned Yankee Environmental Engineering and Research Services, Inc. (Yankee) to make a hydrogeologic investigation of the tannery property in 1983. Yankee was to determine (1) the direction of groundwater flow at the tannery; (2) whether groundwater contamination was present there; and (3) whether the tannery contributed to contamination found at Rileyco's two production wells. The resulting report (Report),[8] based on field research conducted during mid-1983, was never produced in pretrial discovery.

Spurred by their newfound knowledge, plaintiffs moved to set aside the judgment. The district court heard argument on

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at trial and for appeal. That being so, we take no view of the possible utility of other legal theories, *e.g.*, nuisance, to plaintiffs' cause. On the liability aspect of this appeal, we hold only that the district court's factfinding was proper and binding under Fed.R.Civ.P. 49(a) and that, in consequence, plaintiffs are left without a factual foundation for tort claims of any stripe.

[8] In point of fact, there were two reports. Neither was produced. In addition to the original Report, subsequent investigation revealed a 1985 reevaluation of Yankee's data by Margaret Hanley, previously Yankee's project manager, who had moved to a firm called GEI. The later document adds little for present purposes; overall, it is more favorable to Beatrice than the Report. For the sake of simplicity, we limit our discussion to the Report alone, although the district court on remand may consider the nondisclosure and probable effect of both documents. *See* text *infra* Part III(C).

three separate days and denied the motion. *Anderson v. Beatrice Foods Co.*, No. 82-1672-S, slip op. (D.Mass. Jan. 22, 1988) (*Anderson V*). The court made four salient findings: (1) the Report was relevant and within the ambit of plaintiffs' pretrial discovery request; (2) defense counsel had defaulted in their obligation to furnish the Report during discovery; (3) the non-disclosure resulted from "a lapse of judgment" rather than fraud or deliberate misrepresentation, *id.* at 20; and (4) plaintiffs had not been prevented from fully and fairly presenting their case.

A. *Rule 60(b)(3).*

[7] We start with basics. Plaintiffs' motion to upset the judgment was brought under Fed.R.Civ.P. 60(b) and was therefore addressed to the district court's sound discretion. When Rule 60(b) is in play, we ordinarily defer to the trial judge's more intimate knowledge of the case. For us to act, there must be an abuse of discretion. *United States v. Ayer*, 857 F.2d 881, 886 (1st Cir.1988); *Rivera v. M/T Fossarina*, 840 F.2d 152, 156 (1st Cir.1988); *Pagan v. American Airlines, Inc.*, 534 F.2d 990, 993 (1st Cir. 1976). Under this standard, we reverse only if it plainly appears that the court below committed a meaningful error in judgment. *See, e.g., In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1019 (1st Cir.1988) (delineating standard).

[8] In relevant part, Rule 60 states:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party. . . .

Fed.R.Civ.P. 60(b)(3).[9] Failure to disclose or produce materials requested in discovery can constitute "misconduct" within the purview of this subsection. *See Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir.1978). "Misconduct" does not demand proof of nefarious intent or purpose as a prerequisite to redress. For the term to have meaning in the Rule 60(b)(3) context, it must differ from both "fraud" and "misrepresentation." Definition of this difference requires us to take an expansive view of "misconduct." The term can cover even accidental omissions — elsewise it would be pleonastic, because "fraud" and "misrepresentation" would likely subsume it. *Cf. United States v. One Douglas A-26B Aircraft*, 662 F.2d 1372, 1374-75 n.6 (11th Cir.1981) (to avoid redundancy, "misrepresentation" in Rule 60(b)(3) must encompass more than false statements made with intent to deceive). We think such a construction not overly harsh; it takes scant imagination to conjure up discovery responses which, though made in good faith, are so ineptly researched or lackadaisical that they deny the opposing party a fair trial. Accidents — at least avoidable ones — should not be immune from the reach of the rule. Thus, we find ourselves in agreement with the Fifth Circuit that, depending upon the circumstances, relief on the ground of misconduct may be justified "whether there was evil, innocent or careless, purpose." *Bros. Inc. v. W.E. Grace Manufacturing Co.*, 351 F.2d 208, 211 (5th Cir.1965), *cert. denied*, 383 U.S. 936, 86 S.Ct. 1065, 15 L.Ed.2d 852 (1966).

[9] Once we leave the starting gate, the borders of the course blur. The concept of misconduct seems mutable: not every instance of nondisclosure merits the same judicial response. The text of Rule 60(b)(3) gives precious little guidance as to how a court should ascertain the existence of misconduct,

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[9] In this instance, the district court made findings under both Rule 60(b)(2) and Rule 60(b)(3). Nevertheless, plaintiffs' appeal focuses exclusively on Rule 60(b)(3), so we consider any claim for relief under Rule 60(b)(2) to have been waived.

weigh its effect, and ultimately determine when to set aside a verdict. Our sister circuits have set some guideposts along the track: the moving party must demonstrate misconduct — like fraud or misrepresentation — by clear and convincing evidence, and must then show that the misconduct foreclosed full and fair preparation or presentation of its case. *See, e.g., In re M/V Peacock*, 809 F.2d 1403, 1404-05 (9th Cir. 1987) (Kennedy, J.); *Harre v. A.H. Robbins Co.*, 750 F.2d 1501, 1503 (11th Cir. 1985); *Stridiron v. Stridiron*, 698 F.2d 204, 207 (3d Cir. 1983); *Square Construction Co. v. Washington Metropolitan Area Transit Authority*, 657 F.2d 68, 71 (4th Cir. 1981); *Rozier*, 573 F.2d at 1339. Another well-sculpted marker points out that misconduct need not be result-altering in order to merit Rule 60(b)(3) redress. *See Wilson v. Thompson*, 638 F.2d 801, 804 (5th Cir. 1981); *Rozier*, 573 F.2d at 1339; *Seaboldt v. Pennsylvania Railroad Company*, 290 F.2d 296, 299 (3d Cir. 1961); *see also Bunch v. United States*, 680 F.2d 1271, 1283 (9th Cir. 1982) (when information withheld in discovery, aggrieved party need not establish that outcome would have been different).[10]

We are in general concert with these authorities, but find it necessary to place our own gloss upon the subject. Verdicts ought not lightly to be disturbed, so it makes very good sense

[10] This standard is more lenient than its Rule 60(b)(2) counterpart, and properly so. The "newly discovered evidence" provision of Rule 60(b)(2) is aimed at correcting erroneous judgments stemming from the unobtainability of evidence. Consequently, a party seeking a new trial under Rule 60(b)(2) must show that the missing evidence was "of such a material and controlling nature as [would] probably [have] change[d] the outcome." 7 J. Moore & J. Lucas, *Moore's Federal Practice* (2d ed. 1985) ¶ 60.23[4] at 60:201-02 (footnote omitted); *see also Federal Deposit Insurance Corp. v. La Rambla Shopping Center*, 791 F.2d 215, 223-24 (1st Cir. 1986). In contrast, Rule 60(b)(3) focuses not on erroneous judgments as such, but on judgments which were unfairly procured. When wrongful secretion of discovery material makes it inequitable for the withholder to retain the benefit of the verdict, the aggrieved party should not be required to assemble a further showing.

to require complainants to demonstrate convincingly that they have been victimized by an adversary's misconduct. And as with other defects in the course of litigation, the error, to warrant relief, must have been harmful — it must have "affect[ed] the substantial rights" of the movant. Fed.R.Civ.P. 61.[11] Moreover, since parties ought not to benefit from their own mis-, mal-, or nonfeasance, uncertainties attending the application of hindsight in this area should redound to the movant's benefit. *See generally Minneapolis, St. Paul, & Sault Ste. Marie Ry. Co. v. Moquin*, 283 U.S. 520, 521-22, 51 S.Ct. 501, 502, 75 L.Ed. 1243 (1931) (litigant who engages in misconduct "will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent").

Our chief refinement of the conventional "full and fair preparation and presentation" standard is to delineate more exactly how the value of the suppressed evidence should be weighed. By definition, lack of access to *any* discoverable material forecloses "full" preparation for trial since the material in question will be missing. Yet concealed evidence may turn out to be cumulative, insignificant, or of marginal relevance. If that be the case, retrial would needlessly squander judicial resources. The solution, we believe, is that before retrial is mandated under Rule 60(b)(3) in consequence of discovery misconduct,

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[11] To be sure, the misconduct may be sanctionable, even though its aftermath is entirely benign. *See Marquis Theatre Corp. v. Condado Mini Cinema*, 846 F.2d 86, 90 (1st Cir.1988) (defendant who failed in discovery to produce documents that could have proved or disproved allegations of complaint sanctioned by striking of answer); *see generally National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43, 96 S.Ct. 2778, 2780-81, 49 L.Ed.2d 747 (1976) (discussing spectrum of sanctions available for violations of discovery orders). But it does not follow that a new trial is required. The offense can be punished in other more, befitting ways. *Cf. United States v. Hasting*, 461 U.S. 499, 506 n.5, 103 S.Ct. 1974, 1979 n.5, 76 L.Ed.2d 96 (1983) (discussing deterrence of prosecutorial misconduct short of dismissal of charges). There is not always a need to ditch the baby with the bath water.

the challenged behavior must *substantially* have interfered with the aggrieved party's ability fully and fairly to prepare for and proceed at trial. *Accord Carson v. Polley*, 689 F.2d 562, 586 (5th Cir.1982); *cf. Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 504 (4th Cir.1977) (imposition of default judgment as sanction under Fed.R.Civ.P. 37 should be confined to flagrant cases where failure to produce "materially affect[s] the substantial rights of the adverse party" and is "prejudicial to the presentation of his case"), *cert. denied*, 434 U.S. 1020, 98 S.Ct. 744, 54 L.Ed.2d 768 (1978); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 132 (S.D.Fla.1987) (similar).

Under a substantial interference rule as we envision it, a party still need not prove that the concealed material would likely have turned the tide at trial. Substantial impairment may exist, for example, if a party shows that the concealment precluded inquiry into a plausible theory of liability, denied it access to evidence that could well have been probative on an important issue, or closed off a potentially fruitful avenue of direct or cross examination. *See, e.g., Seaboldt v. Pennsylvania Railroad Company*, 290 F.2d at 299 (new trial justified where sequestered information "would have made a difference in . . . counsel's approach to the testimony of several witnesses"). Substantial interference may also be established by presumption or inference. That possibility, however, brings to the fore the utility of some further embellishments.

[10] Although we agree that the existence of misconduct in the Rule 60(b)(3) sense does not depend upon a demonstration of nefarious intent or purpose, *see supra*, the actor's intent is not immaterial. Nondisclosure comes in different shapes and sizes: it may be accidental or inadvertent, or considerably more blameworthy (though still short of fraud or outright misrepresentation). In the case of intentional misconduct, as where concealment was knowing and purposeful, it seems fair to pre-

sume that the suppressed evidence would have damaged the nondisclosing party. *See Nation-Wide Check Corp. v. Forest Hills Distributors, Inc.*, 692 F.2d 214, 217-19 (1st Cir.1982) (deliberate nonproduction or destruction of relevant document is "evidence that the party which has prevented production did so out of well-founded fear that the contents would harm him"); *accord Marquis Theatre Corp.*, 846 F.2d at 89-90; *Knightsbridge Marketing v. Promociones y Proyectos*, 728 F.2d 572, 575 (1st Cir.1984); *Commercial Ins. Co. v. Gonzalez*, 512 F.2d 1307, 1314 (1st Cir.), *cert. denied*, 423 U.S. 838, 96 S.Ct. 65, 46 L.Ed.2d 57 (1975). It seems equally logical that where discovery material is deliberately suppressed, its absence can be presumed to have inhibited the unearthing of further admissible evidence adverse to the withholder, that is, to have substantially interfered with the aggrieved party's trial preparation. *See Alexander v. National Farmers Organization*, 687 F.2d 1173, 1205-06 (8th Cir.1982) (where documents deliberately destroyed, court should draw factual inferences adverse to party responsible); *Telectron, Inc.*, 116 F.R.D. at 134 (where destruction motivated by "flagrant bad faith," conduct "warrant[ed] the inference that the destroyed documents would have been harmful to [destroyer]"; resultant unavailability "must therefore be seen as prejudicial to [innocent party's] interest in pursuing the full and fair litigation of its claims"); *National Association of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 557 (N.D.Cal.1987) ("Where one party wrongfully denies another the evidence necessary to establish a fact in dispute, the court must draw the strongest allowable inferences in favor of the aggrieved party.").

The presumption, if it arises, should be a rebuttable one. It may be refuted by clear and convincing evidence demonstrating that the withheld material was in fact inconsequential. We are keenly aware of the stringency of this standard, yet we believe it to be an appropriate antidote for deliberate misconduct. A

party who is guilty of, say, intentionally shredding documents in order to stymie the opposition, should not easily be able to excuse the misconduct by claiming that the vanished documents were of minimal import. Without the imposition of a heavy burden such as the "clear and convincing" standard, spoliators would almost certainly benefit from having destroyed the documents, since the opposing party could probably muster little evidence concerning the value of papers it never saw. As between guilty and innocent parties, the difficulties created by the absence of evidence should fall squarely upon the former.

Where the documents have been intentionally withheld but not destroyed, the threshold becomes easier to climb. In such situations, the documents themselves may constitute clear and convincing proof that no prejudice inured. *Cf. Eaton Corp. v. Appliance Valves Corp.*, 790 F.2d 874, 878 (Fed.Cir.1986) (where destroyed documents had earlier been produced in discovery and plaintiff unable to show that they bore signigicantly on liability issue, destruction was harmless). Of course, the actual documents are not the only proof of harmlessness which could be clear and convincing. Even when documents have been destroyed, it is possible to present evidence of their general nature and contents, and to decide whether they would likely have been irrelevant or cumulative. *See, e.g., Allen Pen Co. v. Springfield Photo Mount*, 653 F.2d 17, 24 (1st Cir. 1981).

Conversely, where the nondisclosure was accidental — as opposed to knowing or purposeful — there seems less reason for an adverse presumption. *See Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir.1985) (where documents were destroyed routinely, not in bad faith, loss would not support inference that defendant's agents were conscious of weak case); *Soria v. Ozinga Bros., Inc.*, 704 F.2d 990, 996 n.7 (7th Cir.1983) (where incomplete recording "due to the admittedly informal nature of the company's policy rather than willful

destruction of existing records, it would be unfair to create an evidentiary presumption against the company"); *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir.1975) (mere negligence leading to destruction of records does not sustain inference that party believed its case lacked merit); *Ina Aviation Corp. v. United States*, 468 F.Supp. 695, 700 (E.D.N.Y.) (no illation that missing evidence unfavorable "where the destruction of evidence is unintentional or where failure to produce evidence is satisfactorily explained"), *aff'd*, 610 F.2d 806 (2d Cir.1979); *Cf. United States v. Mora*, 821 F.2d 860, 869 (1st Cir.1987) (in assessing explanation for delay in presenting tapes for sealing, court should consider whether delay was caused "deliberately or inadvertently").

[11] While parties who are substantially prejudiced by their opponents' misconduct may make a case for a new trial even absent malicious intent, the burden of showing substantial interference in that circumstance should rightfully rest with the movant. Yet the movant, we suggest, need only carry that devoir of persuasion by a preponderance of the evidence, since the considerations which lead us to impose a heightened burden of proof on one who deliberately destroys or withholds discovery materials are lacking when the default is unintentional and the burden of proof is, therefore, to be hefted by the withholdee.

To summarize, in motions for a new trial under the misconduct prong of Rule 60(b)(3), the movant must show the opponents' misconduct by clear and convincing evidence. Next, the moving party must show that the misconduct substantially interfered with its ability fully and fairly to prepare for, and proceed at, trial. This burden may be shouldered either by establishing the material's likely worth as trial evidence or by elucidating its value as a tool for obtaining meaningful discovery. The burden can also be met by presumption or inference, if the movant can successfully demonstrate that the misconduct was knowing or deliberate. Once a presumption of substantial

interference arises, it can alone carry the day, unless defeated by a clear and convincing demonstration that the consequences of the misconduct were nugacious. Alternatively, if unaided by a presumption — that is, if the movant is unable to prove that the misconduct was knowing or deliberate — it may still prevail as long as it proves by a preponderance of the evidence that the nondisclosure worked some substantial interference with the full and fair preparation or presentation of the case.

In our view, this methodology strikes an acceptable balance between the need to preserve the finality of judgments and the need to enforce discovery rules against those who would seek unfair advantage by withholding information. It does not handcuff the nisi prius court; rather than requiring mechanistic decisionmaking, the protocol which we have delineated envisions that the trial judge will make a series of record-rooted judgment calls in exercising his informed discretion under Rule 60(b)(3) — judgment calls of the sort district courts are uniquely equipped to essay. And because weighing the relevant factors remains primarily a task for the district court, we will ordinarily defer to its assessment of the situation, absent error of law or manifest abuse of discretion.

B. *The State of the Record.*

Although our approach to Rule 60(b)(3) differs somewhat from that employed by the district court, remand is not automatic. *See, e.g., United States v. Mora*, 821 F.2d at 869-70 (though district court used wrong standard, factual findings were sufficiently explicit to allow court of appeals to discern result). It is important, therefore, to peruse the lower court's findings carefully before charting our future course.

[12] 1. *Misconduct.* Though the circumstances giving rise to belated discovery of the Report need not be discussed, the circumstances surrounding its nondisclosure are of great concern. The district court required plaintiffs to establish Beatrice's

misconduct by clear and convincing evidence. *Anderson V*, slip op. at 10. It correctly imputed counsel's knowledge and behavior to the client, found that Beatrice had suppressed the report, and characterized this suppression as "a lapse in judgment." *Id.* at 20. It made no explicit finding as to whether the default was tantamount to Rule 60(b)(3) misconduct. This last omission, however, appears to be of little moment; the record contains clear and convincing evidence — overwhelming evidence, to call a spade a spade — that appellee engaged in what must be called misconduct under the applicable legal standard.

As early as October 1982, plaintiffs asked Beatrice to "indicate the dates and describe the results of any tests of water quality conducted on the water from the Riley land. . . ." Interrogatory No. 30, Set 1. Beatrice filed its response before the Report was compiled, and therefore did not mention it. Subsequently, Beatrice failed to supplement its reply to reveal the Reports's existence.[12] There is no need for us to determine how many angels dance on the head of that particular pin, however, for what transpired thereafter was unarguably in dereliction of appellee's duty. In their second set of interrogatories, plaintiffs asked Beatrice if there had been "any evidence of contamination from the surface of the ground entering the well [on the tannery property]," Interrogatory No. 75; to "[i]ndicate the dates and chemical concentrations found of all additional monitoring efforts that indicated water contamination of the Riley Tannery well," No. 80; and what docu-

[12] It can be cogently argued that this neglect flouted the continuing duty imposed with respect to updating interrogatory answers in certain circumstances. *See* Fed.R.Civ.P. 26(e)(2)(B) ("A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which . . . (B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.") Because the other, later, less borderline violations are more than enough to establish misconduct, *see* text *infra*, we need not pursue the inquiry as to the first set of interrogatories.

ments were "in the possession of any officer or employee of the Riley Company. . . . [relating] to the past or present storage treatment and/or disposal of wastes or any related activities at the Riley Tannery. . . ." No. 92. Appellee objected to these interrogatories. Plaintiffs moved to compel answers and Beatrice cross-moved for a protective order, arguing — unsuccessfully — that the case had focused on the 15 acres, and therefore "the operations of the tannery itself have been and remain irrelevant to the litigation." The district court thought otherwise, denying the motion (April 23, 1985) on the ground that plaintiffs' complaint was "without limitation to the 15-acre tract." It ordered appellee to answer the challenged interrogatories fully.

Beatrice complied on May 30, 1985 — more than a year after the Report had been issued. It eschewed any mention of the document, answering "no" to Interrogatory No. 75 and stating in reply to No. 80 that "[t]he only tests performed on the well of which Beatrice is aware were conducted . . . on behalf of the EPA." (It had earlier responded to No. 92 that "no such documents exist.") Appellee neither amended nor supplemented these representations at any time. This was an outright breach. *See* Fed.R.Civ.P. 26(e)(2)(A) ("A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (A) the party knows that the response was incorrect when made. . . ."). It was not the only one.

Plaintiffs also filed a Rule 34 production request on December 31, 1984. Among other things, they demanded that Beatrice cough up:

> [s]tudies, reports . . . and other documents relating or referring to any contamination of water supplies in the City of Woburn. . . .
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> * * * * *

> [D]ocuments . . . referring to the flow of surface or ground waters in the City of Woburn and surrounding communities. . . .
>
> * * * * *
>
> [D]ocuments . . . referring to the defendants' storage or disposal of chemicals at the property at issue or the John J. Riley Co.

Beatrice replied on February 4, 1985, acknowledging its obligation to produce all non-privileged documents in its possession as to the first two categories, and denying that, insofar as the third request pertained to the 15 acres, it had any responsive documents. It objected to the remainder of the third request. After the objection was overruled, Beatrice represented that it had "produced all responsive documents in its possession. . . ." In a subsequent Rule 34 request, plaintiffs asked for "[a]ll site inspection reports . . . relating to the plant and surrounding property owned by the John J. Riley Company." Appellee agreed to "produce those responsive documents within its possession that have not already been produced. . . ." Each and all of these Rule 34 demands, fairly read, necessitated divulgement of the Report. Notwithstanding, Beatrice played possum — just as it had done with regard to answers to interrogatories. Plaintiffs were never alerted to the existence of the Report. Under principles of fairness and the terms of the Civil Rules, they should have been.

Appellee's knowledge of the Report, before trial and in ample time to make disclosure, cannot be gainsaid. Its chief trial counsel admitted during the hearing on plaintiffs' Rule 60(b) motion that he had seen the Report on January 9, 1986, when it was in the possession of Riley's attorney. The district judge found that Beatrice's counsel should have made immediate inquiry of Riley and disclosed the Report to plaintiffs.

Under the circumstances, such a finding was amply warranted.[13]

The compelling conclusion that appellee's failure to make discovery comprised misconduct within the ambit of Rule 60(b)(3) stands on a solid tripodal base: (1) plaintiffs exercised due diligence in initiating their discovery requests; (2) Beatrice knew, or was charged with knowledge, of the Report, and had constructive (if not actual) possession of it; and (3) Beatrice did not divulge the Report's existence. Of these points, only the second necessitates further comment. Not only did Beatrice enjoy first-hand knowledge of the Report's existence by January 1986, but as the court below found, Rileyco's records were available to Beatrice and under its control within the meaning of the Civil Rules. *See* Fed.R.Civ.P. 33, 34, Among other things, the agreement under which Beatrice sold the tannery and the adjoining wetland to the riley interests provided:

> Following the Closing, [Beatrice] shall continue to defend the Woburn pollution litigation. . . . [Riley] shall cooperate with [Beatrice] in its defense of such litigation and shall make available to [Beatrice] such personnel and records as [Beatrice] may reasonably request in connection with such matter.

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[13] Because appellee itself knew of the Report, we need not consider — and take no view of — whether Riley's knowledge was chargeable to appellee. Although misconduct by a nonparty will not ordinarily foment a new trial under Rule 60(b)(3), *see Metlyn Realty Co. v. Esmark, Inc.*, 763 F.2d 826, 832 (7th Cir.1985), the circumstances of this case are not so clearcut; Riley and Rileyco might well be viewed as agents of, or persons in privity with, Beatrice. Moreover, Riley was subjected to some discovery and like Beatrice — kept the Report a secret. If Beatrice was a knowing party to this coverup, its bona fides could be affected. This aspect of the matter merits aggressive inquiry on remand, *see* text *infra* Part III(C).

This cooperation pact put Riley's information — including the Report — at Beatrice's disposal and, constructively, in its possession. Accordingly, appellee had a duty to make inquiry of Rileyco before answering the interrogatories and responding to the requests for production.

The purpose of discovery is to "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States v. Procter & Gamble*, 356 U.S. 677, 682, 78 S.Ct. 983, 986, 2 L.Ed.2d 1077 (1958). Once a proper discovery request has been seasonably propounded, we will not allow a party sentiently to avoid its obligations by filing misleading or evasive responses, or by failing to examine records within its control. Unquestionably, Beatrice's repeated nondisclosure of the Report stemmed from, and constituted, misconduct as that term is used in Rule 60(b)(3).

2. *Nature of the Misconduct.* We next examine whether appellee's misconduct was knowing, deliberate, or intentional to such a degree as to trigger a presumption of substantial interference. *See supra* Part III(A). The district court made the following finding on this point:

> I do not draw the inference from these defaults, however, that the defendant deliberately and fraudulently suppressed these reports. These reports are not significantly detrimental to the defendants, and in fact contain many conclusions that are favorable to them. Given the vast amount of information made available to plaintiffs in the course of the trial, it seems inconceivable that experienced and competent counsel would have swallowed the camel and strained at the gnat . . . In any case, I do not find that fraud or deliberate misrepresentation has been established by clear and convincing evidence.

Anderson V, slip op. at 19-20 (footnotes omitted). To determine the utility of this finding, we must review what transpired at the Rule 60(b) hearing.

Plaintiffs' presentation occupied the time allotted on the first day. Attorneys for Beatrice and Riley began the second day by offering counterarguments. Plaintiffs then mounted a rebuttal. At the same session, they submitted a written motion asking the district court to make certain inquiries of counsel for Beatrice and Riley, respectively, and reaffirmed the entreaty in their verbal presentation. These requests implicated matters of undeniable relevance, such as counsel's knowledge of the Report and the possibility that further undisclosed information lurked in the shadows. The district court did not rule on the motion. At the third and final session (a week later), plaintiffs brought the matter up again. The court stated that it would hear no further argument and effectively foreclosed the inquiry.[14]

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[14] The colloquy between the judge and Mr. Nesson, one of plaintiffs' attorneys, went as follows:

> MR. NESSON: We have a matter pending before your Honor, which is a motion to inquire, and we stated specific questions which we asked.
>
> THE COURT: I'm not doing that.
>
> MR. NESSON: If you are denying this motion, then before this hearing closes, we ask the right to call [Riley's attorney] to the witness stand and examine her on the issues of fact that relate to this motion.
>
> THE COURT: No. I said to you lask week, you had two shots to do whatever you needed to do on this motion. If you wanted to call witnesses, you should have told me then.
>
> MR. NESSON: We did, your Honor.
>
> THE COURT: Then you should have called your witness.
>
> MR. NESSON: No. We told you that we thought that calling lawyers to the stand was a bad business. We would rather have you make the inquiry. We were hoping and I was hoping that you would make the inquiry.
>
> THE COURT: No.
>
> MR. NESSON: You have not made the inquiry, and at that point I am saying if you've denied this motion, we want to preserve

[13] We sympathize with the district court's frustration, and share its skepticism concerning fractious lawyers who insist upon raising new arguments late in the day. Yet in the circumstances of this case, we think the judge erred in rejecting plaintiffs' motion to inquire — an error that was compounded when he proceeded to make findings of fact on the very matters which inquiry could reasonably have been expected to illuminate.

To begin with, plaintiffs exercised due dispatch regarding the matter. Despite the "two shots" reference by the court, *see supra* note 14, the transcript contains nothing which shows that plaintiffs were put on notice to call opposing counsel at the outset or forgo their testimony. When it first became evident that neither defense counsel's presentation nor the court's queries would directly address the rationale for withholding the Report, plaintiffs' lawyers moved with some celerity. Sensitive to the unseemliness of grilling fellow attorneys, and believing (not unreasonably) that inquiry by the court would be the most decorous way to proceed, they chose to file a written motion to direct the court's attention to the critical issues of what Beatrice knew and when its knowledge was acquired. The procedure which they outlined was a plausible one. The court did not respond, either affirmatively or negatively, notwithstanding an oral reminder. Having filed a timely motion on a relevant subject, plaintiffs were entitled to a ruling. Not having received one, they were justified in continuing to

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rights with respect to that. We now ask you before this hearing closes that we call [Riley's attorney] to the witness stand.

THE COURT: I am not doing anything more on this hearing.

Transcript of Hearings 11/10/87, at 3:48-49. We add that, notwithstanding the court's somewhat oblique statement in reference to what was "said . . . last week," the record of the earlier proceedings contains no disposition of the inquiry motion. Instead, the colloquy appears to have meandered onto other topics, without any indication as to whether the court would or would not question counsel as requested.

press the request at the third hearing. When the court then stated *for the first time* that it would not interrogate the lawyers, plaintiffs promptly sought to call them as witnesses. No greater diligence could reasonably be expected.

Nor was this some fribbling matter of marginal relevance. Where there has been an unrevealed failure to make discovery, the offender's knowledge and intent is of decretory significance in a proceeding under Rule 60(b)(3). Questioning might well have produced evidence that Beatrice knowingly and deliberately concealed the Report;[15] if so, a presumption of substantial interference would arise, sufficient to yoke Beatrice with the burden of showing its defalcation to have been harmless. In a case such as this — where the motion to interrogate was seasonably filed; where the questions were of so salient a nature and might well have yielded results highly pertinent to a reasoned decision on the pending motion; and where the attorneys whose testimony was desired were present and available to respond — we think the district court abused its discretion by refusing to launch the inquiry. We must, therefore, return the case to the court below so that the error may be corrected. *Compare, e.g., United States v. Bailey*, 834 F.2d 218, 226 (1st Cir.1987), *opinion after remand*, 846 F.2d 1 (1st Cir.1988).

[14] 3. *Value of the Evidence.* Because remand is necessary, we need not dwell on the Report's value or the degree to which its absence disrupted plaintiffs' ability to prepare and present their case. For one thing, such matters are tied closely to the question of intent and the existence *vel non* or a rebuttable presumption of substantial interference. We write briefly, however, to indicate that, on remand, the district court must consider only whether nondisclosure of the Report impeded plaintiffs from targeting the tannery as a source of contamination

[15] We do not suggest that there was knowing and deliberate concealment, merely that, absent inquiry, we cannot tell.

and fully and fairly preparing their case *in that respect*. In other words, Beatrice's misconduct notwithstanding, we see no need to revisit the 15-acre wetland and the district court's Rule 49(a) finding that no pollutants flowed to wells G and H from that site.

Our reasoning is straightforward. Although appellants argue that the Report would have assisted them on the issue of groundwater flow vis-a-vis the wetland, the district court found specifically that access to the Report "would have had no effect on the result" at trial. *Anderson V*, slip op. at 9. The court held that the Report was inconsequential to those issues resolved by the Rule 49(a) finding, basing its conclusion upon a painstaking analysis of the contents as they related to the issues and evidence at trial. *See id.* at 5-9. Because that determination appears eminently supportable, it follows that nondisclosure of the Report — whether or not purposeful — could not have worked any substantial interference with preparation or presentation of plaintiffs' case anent the 15 acres.

The second string to appellants' bow is markedly more resilient. They contend that the Report would have aided their efforts to obtain discovery on another theory of their case: that contaminants reached the groundwater *directly from the tannery*, and thereafter were *drawn under* the 15 acres to wells G and H, through the pumping action of these wells. If such a concept was appropriately before the district court, the resultant situation would be materially different from the one addressed by the judge's Rule 49(a) finding. We limn the distinction.

Plaintiffs tried the case against Beatrice on the theory that defendant had negligently allowed the dumping of complaint chemicals on the 15 acres, and that these chemicals percolated into the groundwater and travelled to wells G and H. The court found that the transmission element of this theory had not been proven. That meant that plaintiffs had not sustained their bur-

den of tracing the claimed odyssey of contaminants from the wetland to the wells. Within its own circumference, that finding — which we have sustained on appeal, *see supra* Part II — is the law of the case, but it cannot be extended beyond its natural contours. The district court heard no evidence on, and made on finding as to, the possibility that complaint chemicals had entered the groundwater at the tannery, rather than from the wetland.

[15] That such a claim was actually before the district court is not much subject to doubt. The notion was properly pleaded by plaintiffs, the tannery site being within the scope of their amended complaint. In an April 1985 order, *see supra* at 39-40, the court below acknowledged that plaintiffs' claims were pled "without limitation to the 15-acre tract." Having raised the issue, plaintiffs thereafter sought to pursue it, not hotly and heavily but with some degree of interest and diligence. They attempted to conduct discovery concerning the tannery, requested access to the tannery property for purposes of testing and investigation, and were refused permission to enter.[16] Thus, appellants seem to have been deprived of any fair chance to develop this aspect of their case.

Beatrice urges that, because plaintiffs previously paid comparatively little attention to the tannery during discovery, we are free to conclude that they would have followed the same strategy even if the Report had been timely produced. This exhortation strikes us as idle persiflage. Pretrial discovery follows no set course. An able litigator builds on the information available from time to time, changing direction as new leads emerge and old ones wither. Elementary logic suggests that

[16] We are unmoved by the specious argument that Beatrice could not grant access to the tannery property because the tannery had been resold to Riley. The sales agreement provided that "[Beatrice] shall have access to the [tannery] for the purpose of inspecting the same and conducting whatever soil or other tests it may reasonably deem necessary in connection with the Woburn Litigation." That was enough, in our view, to give appellee constructive control for the purposes at hand.

plaintiffs likely slighted the tannery because they had no evidence, beyond guesswork and surmise, to show that it contributed to the pollution. The Report could have filled this void: Yankee found two of the complaint chemicals present at the tannery site; characterized the data as suggesting that the tannery was "the probable source" of 1,2 transdichloroethylene contamination at the production well on the Riley tannery property; and concluded that groundwater under the tannery site flowed from west to east, toward wells G and H. Such information, if known to counsel, might have made the tannery a higher-priority item on appellants' discovery agenda.

We do not venture to say whether the Report was sufficiently valuable on the issue of contamination at the tannery site that a finding of substantial interference should ensue, but we remit the matter so that the appropriateness of such a finding can be considered. In the first instance, it is for the district court, which has earned an intimate knowledge of the case and has mastered its factual intricacies, to assess the relative impact of the Report and where it might plausibly have led.

C. *Proceedings on Remand.*

We return the case to the court below for further proceedings and findings along the lines described herein. On remand, the court must first conduct an evidentiary hearing and determine whether appellee, acting alone or in concert with the Riley interests (*see supra* note 13), knowingly or intentionally concealed the Report. On this point, plaintiffs must carry the devoir of persuasion. Depending on the outcome of this inquiry, a presumption of substantial interference will or will not arise. *See supra* Parts III(B)(1), (2). In either event, the court should then proceed to receive an orderly presentation from all parties to decide whether the Report (including the Hanley reevaluation, *see supra* note 8) is inconsequential vis-a-vis the plaintiffs' claims insofar as they relate to the tannery

property. The burden and margin of proof, and the identity of the party who must carry it, will depend on the existence or nonexistence of the presumption. *See supra* Part III(A).

In short — presumption or not — the second-stage determination must be whether lack of access to the Report substantially interfered with plaintiffs' efforts to prepare and present a case as to the nexus between the tannery and the pollution of wells G and H. *See supra* Part III(B)(3). Finally, the district court should formulate recommendations, based on its subsidiary findings, as to whether plaintiffs are in its view entitled to any remedy, and if so, the nature and scope thereof.[17] The court shall also furnish us with a recommendation as to the appropriateness *vel non* of sanctions anent any unexcused discovery violations.

We shall retain jurisdiction for the time being. Upon the expeditious completion of the inquiry described above, the district court shall forward its findings and recommendations to this tribunal, with copies to be furnished to the parties. Because of his extensive familiarity with this matter, we direct that the district judge who presided at the trial keep the case on remand, at least for the purpose of making the findings and recommendations necessary to allow us to determine Appeal No. 88-1070.

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[17] If the district court ultimately decides that a new trial is warranted on this issue — and we intimate no suggestion in that regard — the whole case need not necessarily be retried. We recognize that the trial court's Rule 49(a) finding on groundwater flow from the 15 acres, when accorded collateral estoppel effect, might present a formidable barrier to any attempt to link wells G and H with the tannery (which is situated further to the south). Moreover, Beatrice makes a compelling case against tannery involvement, based on the evidence already available. But that may not be the whole story. Opportunity for discovery is the issue where the tannery is concerned, not sufficiency of the evidence. If the court were to find that Beatrice's secretion of the Report improperly foreclosed plaintiffs from conducting tannery discovery, it could reasonably accord them the chance for further discovery limited to that issue — better late than never — in order to see if plaintiffs can uncover enough evidence to go to the jury.

IV. CONCLUSION

We need go no further. We discern no reversible error in the proceedings before the jury, in the verdict, in the district court's Rule 49(a) special finding, or in the partial grant of Beatrice's motion for an instructed verdict. Appellants' other assignments of error relating to the course of trial (including some which we have not deemed worthy of discussion herein) are meritless. Accordingly, we deny and dismiss Appeal No. 87-1405.

We find, however, that the court below did not give appropriate consideration to appellants' posttrial motion to set aside the judgment pursuant to Rule 60(b)(3). Thus, we remand to the district court for rehearing on that motion, under the standards set forth herein. Upon completion of its reconsideration, the lower court should forthwith file findings and recommendations as we have instructed. *See supra* Part III(C). In the interim, we shall retain jurisdiction.

Appeal No. 87-1405 is denied and dismissed.

We retain jurisdiction on Appeal No. 88-1070 and remand to the district court with directions that it conduct the further inquiry envisioned in this opinion and thereafter make findings of fact and recommendations to this court based on the results of the inquiry.

All parties shall bear their own costs.

APPENDIX B.

Anne ANDERSON, et al., Plaintiffs,

v.

BEATRICE FOODS CO., Defendant.

Civ. A. No. 82-1672-S.

United States District Court,
D. Massachusetts.

July 7, 1989.

Action was brought to recover for personal injuries allegedly caused by contamination of a municipal water well. The District Court denied the plaintiff's motion for relief from judgment. Appeal was taken. The Court of Appeals, 862 F.2d 910, remanded for further hearings on the motion for a new trial. The District Court, Skinner, J., held that a tannery owner's concealment of a document was deliberate misconduct warranting a new trial.

New trial granted.

. . . . . .

Jan Richard Schlichtmann, Schlichtmann, Conway & Crowley, Boston, Mass., for plaintiffs.

Jerome P. Facher and Neil Jacobs, Hale & Dorr, Boston, Mass., for Beatrice Foods.

Mary Ellen Ryan, Nutter, McClellan & Fish, Boston, Mass., for John J. Riley Co.

FINDINGS PURSUANT TO REMAND
ON THE NATURE OF THE
DEFENDANT'S MISCONDUCT

SKINNER, District Judge.

This case was remanded by the court of appeals for further hearings on the plaintiffs' motion for a new trial. The court of appeals has retained jurisdiction over the motion itself but has directed me to report my findings and recommendations. *Anderson v. Cryovac, Inc.*, 862 F.2d 910 (1st Cir.1988). The history of the case is fully set out in the opinion of the court of appeals and I shall not restate it. The plaintiffs seek a new trial under Fed.R.Civ.P. 60(b)(3) on the ground that two relevant reports concerning the tannery property had not been disclosed during pretrial discovery. The procedural history of the discovery process is reported in detail in my memorandum and order dated January 22, 1988, a copy of which is appended hereto. I concluded that the defendant had been obliged to make full inquiry of the various Riley companies under the terms of the agreement under which it resold its former Riley Leather division, which included the tannery and the adjacent 15 acre tract, to John J. Riley and his several corporations. If it had done so it would have discovered the existence of these two reports and would have been required to describe them in answers or supplementary answers to successive interrogatories propounded by the plaintiffs.[1] I concluded that this omission was an error of judgment, but found no evidence of fraud. It was my opinion that the reports were basically favorable to the defendant and that the failure to identify them was not likely to have affected the outcome of the trial or to have substantially impaired the plaintiffs' ability to prepare their case. With respect to all of these issues I imposed upon the plaintiffs the burden of proof by clear and convincing evidence. *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978).

[1] The most recent hearing revealed the existence of a number of other relevant documents, which would have been discovered upon diligent inquiry and, although of varying significance, should have been revealed.

In its opinion ordering remand the court of appeals refined the rules governing the burden of proof in the following manner. The moving party must establish the existence of "misconduct" by clear and convincing evidence. If it does so, and also by the same burden of proof establishes that the misconduct was intentional, "as where concealment [of evidence] was knowing and purposeful," 862 F.2d at 925, the movant is entitled to a presumption that the misconduct substantially interfered with the movant's preparation of its case. (Clearly the court intended the same rule to cover actual fraud and misrepresentation as well.) This presumption may only be overcome by clear and convincing evidence to the contrary. If, on the other hand, the moving party proves no more than that the misconduct is accidental or inadvertent, the moving party must carry the burden of proving substantial interference by a preponderance of the evidence.

The court of appeals determined that the defendant's failure to reveal the existence of these reports constituted misconduct. The matter has been remanded to me (1) to conduct more comprehensive hearings on the defendant's state of knowledge and intent, and in particular to permit inquiry of the defendant's principal attorneys; then (2) to make findings as to the nature of the defendant's misconduct in order to determine what presumptions or burden of proof should be applied to the issue of substantial interference; next (3) to "receive an orderly presentation" and to make a finding on the issue of substantial interference; and finally (4) to make a recommendation to the court as to "whether plaintiffs are . . . entitled to any remedy, and if so the nature and scope thereof . . . [and] the appropriateness *vel non* of sanctions anent any unexcused discovery violations." 862 F.2d at 932.

Hearings were held on seventeen different days from January 31 to March 17, 1989. I heard the testimony of 22 witnesses and received 236 exhibits totalling over 2800 pages. Attorneys

Jerome Facher and Neil Jacobs, counsel for the defendant, testified on behalf of the defendant. Mr. Facher was not cross-examined by plaintiffs' counsel. Attorney Mary Ryan, counsel for the Riley interests, submitted an affidavit in lieu of testimony by agreement. Briefs of the parties were filed on April 5, 1989.

Attorney Facher testified that he had no part in the drafting of the agreement between Beatrice and Riley for the resale of the tannery to Riley. He was concentrating on the other aspects of this complex case and paid little attention to it. In his opinion the agreement did not have the significance ascribed to it by me and later affirmed by the court of appeals. He was shown the report from Yankee Engineering briefly on January 9 or 10, 1986, but considered that it was Ms. Ryan's responsibility and not a significant document in any case. At the time the plaintiffs had set a frenetic schedule of depositions which engaged his entire attention. He never intended deliberately to withhold any information from the plaintiffs.

I have no reason to doubt his testimony. Mr. Facher is a trial lawyer of national reputation whose work I have observed in this court on a number of occasions. He has been well known locally for many years as a tough but meticulously ethical advocate.

Mr. Jacobs' testimony was substantially the same as Mr. Facher's, except that he learned of the GEI report at an earlier date through his associate, Mr. Frederico. In addition, prior to the Foley deposition, Mr. Jacobs had a conversation with Ms. Ryan about the GEI report and some other documents in connection with the work product privilege, but considered invocation of the privilege to be Ms. Ryan's prerogative and responsibility. He did not consider the report to be significant. Indeed, the GEI report standing alone is quite innocuous, even though under my ruling and that of the court of appeals it should have been revealed in answers to interrogatories. He

testified that he was primarily concerned with other aspects of the case and that he never intended to deliberately conceal any evidence. While his reputation is not as well established as Mr. Facher's, I have no reason to doubt his testimony either. These attorneys provided a huge volume of potentially inculpatory information to the plaintiffs, and, in my opinion, it has not been established by clear and convincing evidence that either Mr. Facher or Mr. Jacobs deliberately concealed the reports or any other evidence.

Plaintiffs have insisted, however, that Beatrice was engaged in a general conspiracy to prevent the plaintiffs from obtaining the evidence they needed to prosecute their case, evidenced by the resale to Riley of the tannery and the adjacent land. The uncontradicted evidence is that the resale was part of a general plan by Beatrice to divest itself of its unprofitable smaller divisions. The perspicacity of this business judgment is apparent from the fact that the tannery closed December 31, 1988, writing *finis* to the tanning industry in New England. Moreover, the plaintiffs have successfully argued, I have held and the court of appeals has affirmed that the agreement of resale imposed upon Beatrice the same obligation to respond to discovery that it would have had if it had retained the Riley property as a division. The problems of this case have arisen in part because the defendant's trial lawyers did not appreciate the full impact of the agreement. (In fairness it should be said that until my order of January 22, 1988, there was no authoritative interpretation of the discovery obligations arising under such an agreement. It would be a pernicious rule indeed if legal opinions later found to be erroneous were to be equated with fraud. There would be nobody left in the legal system except the justices of the Supreme Court.)

As further evidence of such a conspiracy the plaintiffs offered considerable evidence of removal of material from the 15 acre tract. With the exceptions hereinafter noted I find it

probable that this removal activity was legitimately connected to the drilling of test wells and other investigative procedures that were carried on from 1980 until the time of trial. I do not find credible the testimony of plaintiffs' witness Robbins that there were mounds of blue leather scraps on the 15 acres in 1982 which have since disappeared. In my view it is not likely that such unusual material, even in residual amounts, could have escaped the notice of the platoons of investigators representing the E.P.A. and the parties who have climbed all over this property since 1980. I find the witness O'Doherty to have been a sincere but highly suggestible witness in whose capacity to accurately observe and remember events of 1983 I have little confidence.

Robbins also testified that he recognized an abandoned truck body on the 15 acres as being the remains of a truck formerly used by the tannery. The truck is no longer there. Plaintiffs attribute some significance to this, as evidencing concealment of a practice of the tannery to dump its trash on the 15 acres. The relevance of this testimony, even if it were true, appears remote in the context of a chemical pollution case.

In 1981, or thereabouts, Mr. Riley directed a tannery employee named Sorenson to clean assorted junk, including scrap iron and abandoned truck bodies, from the 15 acres. This may have been done in anticipation of an inspection by the E.P.A., but in any case was prior to the institution of the present action. In August of 1983 Mr. Riley directed a tannery employee named Granger to conduct a clean-up of the 15 acres, but not to disturb any "evidence." Riley told Granger "the less people knew about it the better . . . because we were just preparing for [the E.P.A.] coming in on the property, and to keep it quiet." Granger did keep it quiet insofar as it was possible to do so working with a diesel front end loader and a dump truck in broad daylight, with representatives of the E.P.A. present on the property.

In late August or early September, 1983, Granger and Sorenson discovered a small pile of reddish-brown "peatlike" material about three cubic yards in volume near the southern boundary of the 15 acres. Riley was very upset when he saw it, so Granger and Sorenson dug up the pile and carted most of it away to a dumping area above the tannery. Granger covered the remaining material with leaves. A fairly substantial amount of the material remained, however, and was discovered by the plaintiffs during their inspection of the property. One sample of this material, moreover, contained a substantial concentration of trichloroethylene, one of the complaint chemicals. Plaintiffs introduced this sample at trial and asserted that it was sludge from the tannery's sedimentation tank. All of the tannery's personnel who were called as witnesses, except Granger, testified that this material bore no resemblance to anything that they had ever seen on the tannery property. Granger testified that the material looked like tannery sludge but did not smell like tannery sludge, which smelled strongly of manure. I compared samples of this material with samples of tannery sludge both at the trial and during the recent hearings and found them totally different in color, consistency and odor.

In the recent hearings the plaintiffs took the position that this material consisted of "tailings" from the tannery, i.e., fatty fiber scraped from the inside of cowhide during the tanning process, to which it bore superficial resemblance. At my insistence the material was finally subjected to chemical analysis. On the basis of the resulting expert testimony, I am satisfied that this material is in fact a residual by-product of the manufacture of poylvinyl chloride, a common plastic often used for water and sewer pipes and having no connection whatsoever with the tanning of leather.[2] It was presumably

[2] This was established through the testimony of Dr. Owen C. Braids, a soil chemist. I initially viewed Dr. Braids with considerable distrust because of some highly suspect testimony concerning methanotropic bacteria which he

dumped on the 15 acres by one of the neighboring chemical factories.

The foregoing recitation suggest some deviousness on the part of Mr. Riley, even though the removal activities turned out to have no consequences as far as this case is concerned. This evidence does not, however, in my opinion, warrant a conclusion that there was a general conspiracy encompassing the failure to reveal the existence of documents, which I view as a discrete problem. The only common thread is the secretive disposition of Mr. Riley.

Plaintiffs also argued that there was a conspiracy between Beatrice and its expert hydrogeologists to subvert the results of the 1985 pump test of wells G and H by failing to monitor Riley well # 2. The weight of the evidence was that it was the suggestion of these experts to monitor well # 2 in the first place, but they were unable to do so because of the shape of the well-head. Accordingly they devised a substitute test. Failure of various witnesses to recall conversations and correspondence six or seven years in the past is very slim evidence of fraud. Without detailing every item of testimony adduced by the plaintiffs, in my opinion the aggregate evidence was insufficient to establish the generalized conspiracy which they so earnestly asseverate.

Aside from Messrs. Facher and Jacobs, whose roles have been described above and in my memorandum and order of January 22, 1988, the key players in the concealment of the Yankee and GEI reports and various less significant documents were Mr. Riley and his attorney Ms. Ryan. Before assessing

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gave during the original trial. His analysis of this reddish-brown material convinced me that on this subject, at least, he is a genuine expert. He was subjected to an extremely well-prepared and aggressive cross-examination by plaintiffs' counsel, but the harder he was pressed the more convincing he became. The plaintiff's expert, on the other hand, was a medical toxicologist who is only minimally qualified as a chemist, and his analytical method was relatively crude. Accordingly, I reject his opinion that the tested material contained animal fat.

their roles in the matter it is necessary to make a preliminary determination of whether their conduct is chargeable to the defendant.

It is clear that Ms. Ryan and defendant's lawyers were in close communication with one another during the discovery period and in preparation for the trial in this case. A large part of the fees charged by Ms. Ryan's law firm for her representation of the Riley interests were paid by Beatrice. Riley expressed a personal interest in establishing that the Tannery was "clean," so that his interest coincided with the defendant's. As described above, defendant's attorneys shifted the responsibility for dealing with the plaintiffs' attempts to obtain discovery of Riley documents to Ms. Ryan. The words used by the court of appeals, "agency" and privity," carry historical baggage which would serve no useful purpose to explore. In my view, the activities of Ms. Ryan, Mr. Riley and the defendant's attorneys were so functionally synergistic, however otherwise categorized, that the conduct of Ms. Ryan and Mr. Riley should be attributed to the defendant.

[1] Mr. Riley ordered the Yankee report in 1983, without the knowledge of his attorney, partly because he was concerned about possible litigation, but mostly because Margaret Hanley, Yankee's project manager, persuaded him it would be a good idea. The GEI report was ordered by Mr. Riley with the assistance of his lawyers, Nutter, McClennen & Fish (Ms. Ryan's firm) because certification of compliance with certain environmental regulation was a necessary prerequisite to the obtaining of financing. GEI recommended further studies to be done by it, but Mr. Riley and the attorneys determined that the expense of further study was not warranted and this recommendation was eliminated from the report. Mr. Riley testified that he never told Beatrice about these reports because he considered that what he did after the resale to him was none of Beatrice's business. He did give both reports to Ms. Ryan.

In his testimony on deposition and at trial Riley denied the existence of these reports. With respect to each question, taken separately, the answer might be justified because of hypertechnical interpretations of the questions posed by the interrogator. (For instance, "Did *you* test the sludge?" Answer! "No." Fact: He *caused* a test to be made by someone else.) Similarly one could quibble over the definition of the documents. There were enough such questions, however, so that any fair response should at one time or another have revealed the existence of these reports. In addition, Mr. Riley denied the existence of laboratory reports and chemical formulas which were clearly called for. Even allowing for Mr. Riley's apparent unsophistication and inarticulateness, I conclude that the pattern of evasive answers concerning these reports and the other documents by Mr. Riley requires a finding that the concealment was deliberate.

[2] Ms. Ryan took (and takes) the position that the Yankee and GEI reports are protected from discovery under Fed.R.Civ. P. 26(b)(33). In view of the history of these reports this position is subject to considerable question as a matter of law, particularly with regard to the GEI report, but I suppose it is at least arguable. Invocation of Rule 26(b)(3), however, does not permit concealment of the exempted documents, which must be identified sufficiently to permit judicial resolution of the issue if it is contested by the party seeking discovery.

In 1986, the plaintiff deposed Edward Foley, who was represented to be the keeper of the records of the tannery corporation (Mr. Riley having sold the business to his former employees). The deposition subpoena called for

> [all documents including] site inspection reports, geophysical studies or reports, plans, photographs, diagrams, . . . relating or referring to . . . [the John J. Riley Co.]

Ms. Ryan filed a general objection to the production of such documents (except as to the 15 acres) on the ground of relevance and the privilege accorded "attorney work product." No such documents were produced at the deposition.

Foley was then asked if there were any documents responsive to the quoted language of the subpoena which he had not brought with him. He answered "No." It is probable that Foley, who was an office manager, did not know about the reports. Ms. Ryan, however, who was present, did know about them and did not correct the answer. Although the plaintiffs did not file a motion to compel, the matter was resolved outside of court by Ms. Ryan's production of documents that had been identified at the deposition as withheld, but not the Yankee and GEI reports. Plaintiffs, accordingly, did not press a motion to compel. By this lack of candor and subsequent misdirection the plaintiffs were led to believe that no other reports existed.

In my opinion, the behavior of Mr. Riley and Ms. Ryan described above constitutes "deliberate misconduct" entitling the plaintiffs, under the new rule of the court of appeals, to a presumption that the nondisclosure of the reports substantially impaired their preparation for trial.

It is so ordered. The clerk will assign a date forthwith for a conference to settle upon the "orderly procedure" mandated by the court of appeals for the next stage of these proceedings.

APPENDIX

United States District Court

District of Massachusetts

Anne Anderson, et al., Plaintiffs,

v.

Beatrice Foods Co., Defendant

Civil Action No. 82-1672-S

MEMORANDUM AND ORDER ON PLAINTIFFS' MOTION FOR A NEW TRIAL

January 22, 1988

This motion under Fed.R.Civ.P. 60(b)(2) and (3) for a new trial arises out of the plaintiffs' discovery in September, 1987 of a report prepared in 1983 by Yankee Environmental Engineering and Research Services, Inc. ("YE²ARS") for John J. Riley Tanning Company, Inc. ("the Riley Company"). This report was submitted to the Environmental Protection Agency ("EPA") by the successor to the Riley Company in December, 1986, several months after the close of the trial in this case, in connection with an ongoing study of the Aberjona Valley aquifer by the EPA. The plaintiffs assert that this report constitutes new evidence under Rule 60(b)(2) or alternatively was improperly withheld during discovery by the defendant under circumstances that constitute fraud or misrepresentation under Rule 60(b)(3).

The first question concerns the timeliness of the motion. On September 17, 1986, I wrote a rather extensive memorandum denying the plaintiffs' request for reopening of the trial after an adverse verdict and ordering the immediate entry of judgment. A separate form of judgment was prepared and signed by the deputy clerk on October 2, 1986. A copy is with the papers and a copy was sent to defendant's counsel. No entry is made on the docket. It does not appear whether a copy was sent to plaintiffs' counsel. They deny having seen it. Plaintiffs did, however, file a notice of appeal on October 31, 1986 and proceeded to prepare an appeal to the Court of Appeals. In late April or May, 1987, counsel's attention was called to the lack of a docket entry of judgment. Counsel called

the deputy clerk, and the deputy clerk submitted a form of judgment for my signature. Judgment for the defendant was entered on May 8, 1987. No notice of this entry was given to the defendant by the clerk.

I have not been able to get any explanation from the deputy clerk of the several lapses in the procdures of his office.

In any case, a motion for a new trial under Rule 60(b)(2) and (3) must be made within one year from the entry of judgment. In my view, the judgment was not entered until a docket entry was made on May 8, 1987, although it is clear that it ought to have been entered on October 2, 1986 and that the parties conducted themselves as if it had been. Accordingly, this motion was timely filed.

I. *Analysis of the 1983 Report.*

YE²ARS dug test pits and five test wells on the tannery property in 1983. The tannery property is upland lying to the west of the Aberjona River floodplain and is the location of the Riley Tannery. It is to be distinguished from the 15-acre parcel lying in the floodplain of the Aberjona, on which was found high concentrations of chlorinated solvents and which was the focus of the case against the defendant Beatrice Foods Co. The tannery property and the 15-acre site had both been owned by the original tannery corporation, and subsequently owned by Beatrice until 1983, when the tannery property was resold to the Riley Company, and the 15 acres were sold to the Wildwood Conservation Corporation. Both corporations were owned by John J. Riley, who had been the owner of the original tannery corporation and the manager of the tannery while it was owned by Beatrice.

The report stated in summary that the tannery property was located on loose and highly permeable subsoil in which the ground water flow was consistently from west to east, i.e. toward the 15 acres and the river valley. Two production wells

(PW1 and PW2) used by the tannery had been found in 1980 and 1981 to contain significant amounts of the chlorinated solvents at issue in this case. PW1 is on the tannery property; PW2 is on the 15 acres. In 1983, .4 part per *billion* each of trans 1,2-dichloroethane and trichloroethane was found in PW1 and .7 per per *billion* of trans 1,2-dichloroethane was found in one of the test wells. Various metals and other chemicals not relevant to this case were found on various parts of the property. Sludge taken from a sedimentation tank of factory wastes had been mixed with fill on the northwest part of the property, and the result was a black sludge resembling peat. Its permeability was "expected to be similar to naturally occuring [sic] peat and organic matter (10^{-2} to $10^{-3}ft^3/ft^2day$) (ft/day)." This was not the tested permeability of the peat in question but appears to be a standard rating for peat in general and indicates low permeability.

In addition, the report contains the conclusions that groundwater flow at PW1 is influenced by pumping at PW2 and that contaminants at PW1 *may* contribute to the contamination of PW2. The studies do *not* indicate, however, that groundwater up gradient of PW1 (i.e., at the tannery site) is influenced by PW2. In general, the possibility of contamination of groundwater at PW2 (on the 15-acre site) by chlorinated solvents on the tannery site, while not definitely excluded, is substantially discounted.

II. *New Trial Because of Newly Discovered Evidence (Rule 60(b)(2))*

In terms of the effect of newly discovered evidence, it probably can be safely assumed that if the 1983 YE²ARS report had been introduced at trial, there would also have been introduced a 1985 follow-up report by Geotechnical Engineers, Inc. ("GEI"), which was based on the data developed in the 1983 study. The 1985 report recites that there were no relevant

chemicals detected in the landfilled sludge north of the catch-basin. The detection limits of this test for trichloroethane and tetrachloroethylene were 5 parts per billion, for trichloroethylene 10 parts per billion and for dichloroethylene 50 parts per billion. It leaves open the *possibility* of contamination in lesser quantities. The report concludes that the tannery site is not the source of contamination to the east or of City of Woburn Wells G and H.

Furthermore, introduction of the 1983 YE²ARS report would have inevitably led to the testimony of Ms. Margaret Hanley, a geologist who was the project manager for both reports, having herself migrated from YE²ARS to GEI. Among other things, she would have testified according to her affidavit that reported concentration of less than one part per billion in groundwater "may be unreliable since it is possible for such levels to be obtained as a result of laboratory or equipment error or instrument contamination."

In considering the probable impact of the 1983 YE²ARS report, however, I have disregarded the 1985 report and Ms. Hanley's affidavit, and evaluated it as an isolated item. I find the 1983 report more favorable to the defendant than otherwise, or at the most of neutral value, and I conclude that even if it had been introduced at trial, it would not have been likely to affect the result. The plaintiffs' arguments to the contrary are undeniably creative but in my view unpersuasive.

Plaintiffs' first argument is that the reference to the low permeability of peat would have supported Dr. Pinder's testimony that the bottom of the Aberjona River was sealed by a layer of relatively impermeable peat so that water would not have been drawn in substantial amounts from the river into Wells G and H when they were pumping. Indeed, it was a major issue at trial whether the bottom of the river was a "seal" as contended by plaintiffs, or a "sieve" as contended by the defendants. That issue did not turn on the permeability of peat,

defined by Dr. Pinder as a dense amalgam of fine organic particles, however, but whether the river was lined with that kind of peat or with a loose jumble of roots, branches and uncompacted organic detritus. I do not find the 1983 report would have had any effect on this dispute, or in any way assisted Dr. Pinder in explaining the substantial loss of water from the river during the pumping test as measured from the site upstream and downstream of the wells.

Secondly, the reference in the report to the sludge and fill having a peatlike appearance is said by plaintiffs to support their assertion that certain material found by them on the 15-acre site and also described as having the appearance of peat came from the tannery. The material found on the 15-acre site was in one instance rust-colored and in another instance bright orange coated with black. Both were impregnated with various chemicals, including chlorinated solvents and chemicals associated with tanning leather. They had a leatherlike smell. Samples of these items were introduced at trial, but never linked to the tannery operation. The peat resulting from the sludge and fill is described as black. The jury and I observed the sludge from the sedimentation tank. It is uniformly dark grey and emphatically does not have a leatherlike smell. It smells of the barnyard, and right pungently too. All the report does is describe the sludge and fill as peatlike, the same phrase used by plaintiffs' witness to describe the material found on the 15 acres. That is not enough to connect two obviously disparate substances. Furthermore, it is my recollection that the sludge and fill combination was described in the same general terms by either Riley or Foley in the course of the trial.

Thirdly, the report is supposed to have supported the plaintiffs' position that the west bank of the Aberjona valley was made of highly permeable subsoil. So far as I remember, this proposition was never contested, and indeed is implicit in the general reference to the valley as an aquifer.

Fourthly, by showing that groundwater at PW1 was influenced by pumping at PW2, the report shows that the railroad bed along the west side of the river is not a barrier to the cone of influence of Wells G and H. Again, I don't believe this was an issue at the trial. One of the plans available to the plaintiffs showed the cone of influence extending to the west of the railroad, though not at this point. Further, it was known that in the area of PWs 1 and 2 there was a natural swale running from the tannery property to the river containing a brook which ran under the railbed through a culvert. If the plaintiffs had been concerned with this phenomenon, it was clear enough. The contamination of both Riley production wells was covered in the testimony, and the subject of a long (and irrelevant) cross-examination of Mr. Riley by plaintiffs' counsel concerning drinking water in the tannery plant. Moreover, all the significant contamination was to the east of the railroad anyway.

Fifthly, plaintiffs claim that the 1983 report would bolster Dr. Pinder's assertion that PW2 had a weak influence on the ground water flow in the valley and thus would have not greatly encroached on the cone of influence of Wells G and H. The report says that pumping of PW2 did not significantly affect ground water flow at the tannery site, considerably uphill. It says nothing about its influence in the floodplain of the Aberjona.

Lastly, plaintiffs' counsel asserts that the report shows the tannery property to be the source of the same chlorinated solvents which contaminated Wells G and H. This is rhetorical excess. The report does not show that. The .7 part per billion of trans 1,2-dichloroethane is not significant, even assuming that it is the same substance as 1,2-transdichloroethylene which is alleged to have contaminated the well. It was the uncontradicted testimony of Dr. Braids that they were not the same compounds and in fact were in a different chemical chain.

The parties agree that for a new trial to be granted because of newly discovered evidence, the evidence must be significant enough to create a probability that it would have altered the result if introduced at trial. As I have stated, I am not persuaded that it probably would have altered the result. In fact, it is my opinion that it would have had no effect on the result. Accordingly, insofar as the motion relies on Rule 60(b)2), it is DENIED.

III. *New Trial by Reason of Fraud or Misrepresentation, Rule 60(b)(3).*

Resolution of the Rule 60(b)(3) issues requires a more detailed, more difficult and more speculative analysis. Plaintiffs claim that the 1983 and 1985 reports were deliberately withheld by the use of false statements in discovery responses, or alternatively, that defendant's counsel was guilty of "gross neglect" in failing to disclose the reports.

For the plaintiffs to prevail, they must establish the deliberate misconduct of the defendant or its counsel by clear and convincing evidence, and with respect to withholding of information, that they were prevented from fully and fairly trying their case, regardless whether the result would have been different. *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir.1978); *Petry v. General Motors Co.*, 62 F.R.D. 357 (E.D. Pa.1974). Among the considerations are the defendant's duty to provide the information, the sufficiency of plaintiffs' requests and the diligence of its pursuit of discovery, the degree to which the evidence supports a conclusion of misconduct, and the extent to which it is likely that plaintiffs would have altered their trial strategy if the information had been provided.

The defendant says that this was not information within its control, but that the 1983 report was prepared for the John J. Riley Tanning Company, Inc. (the "Riley Company"), a separate and unrelated corporation and the 1985 report was prepared

for its law firm, Nutter, McClennen & Fish. The defendant's counsel says that it was his understanding with plaintiffs' counsel that plaintiffs would look to the Riley Company and its counsel for information in their possession and control. This arrangement is borne out to some extent by the record, which shows that plaintiffs took the depositions of John J. Riley and other personnel of the Riley Company, who were represented by Attorney Mary Ryan of the firm of Nutter, McClennen & Fish. Ms. Ryan also represented the Wildwood Conservation Corporation, the new owner of the 15 acres, and plaintiffs negotiated with her for their extensive drilling and digging on this site.

At this point, it becomes necessary to summarize the course of the pretrial proceedings. The case started off with considerable fanfare and an acrimonious Rule 11 proceeding. Discovery proceeded with reference to medical matters for several years. Both sides wished to extend the discovery period to await the completion of massive studies of the Aberjona valley by the Environmental Protection Agency and the United States Corps of Engineers. In the late spring of 1985, site investigation began in earnest, beginning with the W. R. Grace Co. facility on the east side of the valley. In the fall, the plaintiffs turned their attention to the 15-acre site. A heavy schedule of depositions began (8-14 depositions a day). The plaintiffs insisted that they would be ready for trial in February 1986 and adamantly opposed any extension in the face of the defendant's pleas that they could not prepare for the new information and the new discovery called for by the plaintiffs and still prepare for trial. I also cautioned plaintiffs' counsel that the frenzy of discovery indicated that the plaintiffs' own case was still being prepared and that it would be a mistake to rush to trial without adequate preparation.

The first request to me for an order to go on the tannery site was on January 15, 1986, one month before trial. I denied it

because it was too late in my opinion to open up a new area of investigation which the defendant would not have a chance to evaluate before trial. I therefore denied the request and also cut down on other last minute discovery. The plaintiffs would not agree to an extension of the trial date.

Prior to this hearing, plaintiffs had noticed the deposition of Edward J. Foley, treasurer of Riley Leather Company, which had purchased the tannery site from the Riley Company. Ms. Ryan had objected to so much of the deposition subpoena as would have required the production of the 1983 and 1985 reports. At the January 14, 1986 hearing, Ms. Ryan called to my attention the fact that she had raised these objections and that she expected the plaintiffs to file a motion to compel production of the withheld documents. Plaintiffs' counsel replied that the question had been resolved. Since he did not put Ms. Ryan's objection to the test, he cannot now seek a new trial on the basis that the reports were not furnished at the deposition of Foley. Plaintiffs' counsel also asserts that a similar subpoena duces tecum was issued for John J. Riley. Ms. Ryan says that the attachment cataloguing documents was not attached to the subpoena. In any case, the issue was not raised at trial during the extensive cross-examination of Riley, and cannot be raised now.

I must then review the record to see if Beatrice or its counsel (as distinguished from Ms. Ryan and her clients) had a duty to produce these reports at any point in the proceedings. I reject as unsubstantiated the accusation of plaintiffs' counsel that Ms. Ryan and Beatrice counsel were engaged in a deliberate conspiracy to deprive the plaintiffs of information. The fact that their interests coincided from time to time does not support an assertion of conspiracy.

I also reject defense counsel's denial of any control over documents in the possession of the Riley Company, its counsel, the successor corporation, Riley Leather Company, and the

Wildwood Conservation Corporation. When Beatrice sold the tannery and the 15 acres back to the Riley interests, after the commencement of this litigation, it agreed to be responsible for any liability imposed in this litigation on account of activity on these properties occurring prior to the closing date of the sale, January 6, 1983. In connection therewith, the Riley Company and Wildwood agreed to make available to Beatrice all records and personnel reasonably requested by Beatrice for the conduct of its defense. In my view, although the Riley corporations were not parties, the contract causes their records to be "available" to the defendant and "under the control" of the defendant within the meaning of Fed.R.Civ.P. 33 and 34. Accordingly, the defendant was required to make reasonable inquiry of the Riley interests through Ms. Ryan concerning the existence of any documents fairly called for by interrogatories and requests for production. Defendant's counsel did not read the contract as imposing this requirement and did not make such inquiry of Ms. Ryan or her clients. Whether this default was sufficiently egregious as to require a new trial requires a detailed review of the discovery history. For this I rely on the Plaintiffs' Submission Regarding Their Exercising Due Diligence and Defendant's Wrongful Suppression (Plaintiffs' Chronology) filed November 2, 1987 and defendant's Response and Opposition to Plaintiffs' "Chronology, etc." filed November 10, 1987.

In the plaintiffs' Chronology are references to requests for extensions of time to which in general the plaintiffs assented and the filing of objections. No inference of improper concealment can be drawn from either of these filings. Requests for extensions in complex cases are commonplace and in fact the plaintiffs were often late in responding to discovery. Frivolous or unfounded objections may be the subject of sanctions but they must be tested by timely challenges. I deem any challenge to objections taken during the course of discovery to have been waived.

Similarly, the history of discourse between Nutter, McClellen & Fish and the Attorney General does not bear on this case. It dealt with waste disposal through the MDC. In it the Riley Company took the position that chlorinated hydrocarbons in the waste water came from the admittedly polluted PW2, which in turn was polluted because of endemic conditions in the Aberjona Valley which were not specific to the tannery. There is nothing in this record to show that this was a wrongful conclusion, and quite a lot of evidence supporting it.

Similarly, defendant's assertion in pleading that the tannery was not the source of pollution of the aquifer is a misrepresentation only if the plaintiffs' allegations are correct, and the defendant knew them to be correct. Neither proposition has been proven, and indeed neither proposition has credible support in the record up to this point.

The proper focus of the inquiry is on the specific requests for information and the specific responses of the defendant. The first of these were presented in plaintiffs' first set of interrogatories. Interrogatory 30 called for reports such as the YE²ARS report. The response was filed in April of 1983, before the YE²ARS report was in existence. No supplemental answer was ever filed. Interrogatories 40, 41 and 42 refer specifically to documents in the possession of any officer or employee of Beatrice Foods Co. By reason of that limitation, these interrogatories did not trigger the obligation to make reasonable inquiry of the Riley Company or its lawyer. On May 30, 1985, in response to a court order, defendant answered that it had no such documents. This was a true answer, given the limitation in these interrogatories.

In the second set of interrogatories, plaintiffs ask for documents dealing with disposal of wastes or any related activities at the Riley tannery in the possession of any officer or employee of the Riley Company (#92). On April 2, 1983, the defendant answered that none such existed. This was a true answer when filed, but was never supplemented.

On December 3, 1984, plaintiffs filed a request for the production of documents relating or referring to defendant's storage or disposal of chemicals at the property at issue on the John J. Riley Company. In effect, the defendant objected to producing material dealing with the tannery and stated there were no such documents relating to the "Riley land," presumably referring to the 15 acres.

On April 3, 1985, John J. Riley, Jr. was deposed as follows:

> Q. Have you ever done an analysis of that soupy sedimentation material?
> [Objection]
> Q. My question to you is: Have you ever done an analysis or testing of that sedimentation tank material?
> [Colloquy]
> A. No.

In fact, YE²ARS had done a test of the sludge after it had been removed from the tank and mixed with fill. If Riley understood the question to mean a test of the material in the tank, his answer was correct. It is not clear what was meant. In any case, in fairness to Riley, it should be noted that the 1983 report made only a passing reference to the testing of solid fill. The testing results are in an appendix in a form not readily accessible to a layman. The 1985 GEI report does describe the testing of the solid fill in detail, but, according to Miss Hanley's affidavit, this report was not submitted to Riley at all, but went directly to Nutter, McClennen & Fish, the attorneys for the Riley Company. I am not prepared to find clear and convincing evidence of fraud from this recitation.

On May 30, 1985, the defendant filed a further answer to No. 80 of the second set of interrogatories. No. 80 asked for chemical concentrations that indicated contamination of the Riley production well (presumably PW2). If the defendant had

made inquiry of the Riley Company, it should have included the 1983 YE²ARS report in its response.

In their third set of interrogatories, plaintiffs in interrogatory #2 ask for a description of all inspections of the "Riley land" by Beatrice Foods, its servants, agents or employees and by the Riley tannery, its servants, agents or employees since May, 1979. In its answer, defendant assumed that "Riley land" means the 15 acres and makes no answer with reference to the tannery site. This assumption does not appear to have been challenged by the plaintiffs.

On December 20, 1985, plaintiff filed a second request for production of documents seeking, among other things, all site inspection reports.

On or about January 10, 1986, counsel for defendants learned of the existence of the 1983 and 1985 reports. On January 17, 1986, the defendant responded to the request for production that it would produce responsive documents in its possession. It did not provide the 1983 and 1985 reports. Counsel for the defendant stated in argument that in his opinion, these reports were not site inspection reports, and that he therefore was not obliged to produce them.

The duty on the defendant to make inquiry of Ms. Ryan and her clients is ordinarily discharged with respect to a specific discovery request by one inquiry. Defendant was not required to call her every day to ask what was new. In my view, however, a new discovery request in different terms demands a new inquiry. If my analysis is correct, the defendant defaulted in its obligations after the completion of the 1983 report in its failure to fully answer to Interrogatory 80 on May 30, 1985. Moreover, Rule 26(e)(2)(B) requires that a party supplement a response when it learns that the response is no longer true. In January, 1986, defense counsel learned of these reports and should have supplemented its answers and, in my view, should have revealed the reports in response to the second request for the production of documents.

I do not draw the inference from these defaults, however, that the defendant deliberately and fraudulently suppressed these reports. These reports are not significantly detrimental to the defendants, and in fact contain many conclusions that are favorable to them. Given the vast amount of information made available to the plaintiffs in the course of the trial, it seems inconceivable that experienced and competent counsel would have swallowed the camel and strained at the gnat.[1] Moreover, the Riley Company was not an agent of the defendant, and there was no prior court ruling establishing the obligation I postulate herein to make inquiry based upon a contract such as existed in this case. I base my ruling solely on an interpretation of the words "available" and "control" in Rules 33 and 34. Counsel may well have thought he was entitled to rely on the informal arrangement betwen Ms. Ryan and plaintiffs' counsel. Failure to disclose these reports in January, 1986 was in my view a lapse of judgment, but in the midst of the discovery frenzy that was initiated by plaintiffs in that period, these reports may have seemed minor. In any case, I do not find that fraud or deliberate misrepresentation has been established by clear and convincing evidence.[2]

That finding does not end the inquiry, however, because Rule 60(b)(3) goes further according to *Rozier* and requires a new trial if the "misconduct" of the defendant has prevented the

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[1] The gospel according to St. Matthew, 23:24, Plaintiffs' assertion that these reports represented a real threat to the defendant requires the creation of an imaginative scenario for which there appears to me to be little if any support.

[2] Plaintiffs point to an "altered document" furnished by the defendant in response to an interrogatory. The interrogatory called for information about water testing. In response, defendant submitted a report, part of which dealt with water testing, and from which other subjects had been redacted. It was plain from the appearance of the document that portions had been redacted. This was a perfectly appropriate response to the interrogatory; indeed, it is not good practice to lard a response with information not requested. Plaintiffs' argument that this is evidence of a fraudulent intent is unworthy, particularly from counsel who have made strident demands for fairness.

plaintiffs from fully and fairly presenting their case. As the court noted in *Rozier*, this is a "vexing question."

Assuming for the minute that the reports need not have been furnished until January, 1986, failure to furnish them had no effect on the plaintiffs' preparation whatsoever. Plaintiffs claim that if they had known of the reports they would have monitored the five test wells on the tannery site during the pumping test of Wells G and H and would have conducted tests of the solid fill on the site. In January, 1986, however, the pumping test was all over. At that time the plaintiffs sought an order to test the tannery site in any case. I denied it because it was too close to trial to open up a new area of complaint without giving the defendant time to evaluate and respond to whatever information was developed. Plaintiffs were adamant about holding the trial date. I would not have made any other ruling if I had known of these reports. The controlling factor of the imminence of trial would not have changed, and I would not have been impressed by the scant promise of success to the plaintiffs offered by these reports.

I think it is likely, however, that if these reports had been furnished prior to the pump tests, as on one theory at least they should have been, the plaintiffs would have monitored the five test wells on the tannery property, although they did not in fact monitor PW1 and PW2. I believe it highly unlikely that the results would have been significant. At best, it would have added some slight corroboration to their cone of influence theory. The 1983 report shows that ground water at the tannery was not influenced by the pumping of PW2, a very powerful pump at the very foot of the hill on which the tannery sits. It seems to me wildly speculative that it would have been influenced by Wells G and H, which were at least 1,800 feet farther away. The test wells were on high ground, substantially above the floodplain where the other monitoring wells were located. In any case, this default cannot be cured by a new trial. It is no

longer possible to have a pump test of Wells G and H; they have both been totally dismantled by the City of Woburn.

If the plaintiffs had received the reports early in the course of discovery, would they have been diverted from the productive discovery they were otherwise engaged in to test fill in which no chlorinated solvents had been found and in which the only positive test was of .7 part per billion in one test well? I think it unlikely. In January, 1986, Mr. Nesson said that the plaintiffs had been busy with the complex medical evidence and the excavation of the W. R. Grace site. In the fall of 1985 they had gotten around to the 15 acres, where there were concentrations of many thousands of parts per billion. According to Mr. Nesson, they were just getting around to the tannery in January of 1986. I seriously doubt that the sequence of events would have been different even if the plaintiffs had received these reports when they should have.

The integrity of the discovery process is clearly central to the conduct of litigation in the federal system, and any default in responses to discovery is a serious matter deserving of the most careful attention. After consideration of what I believe to be the pertinent factors, however, I find that the plaintiffs have not satisfied their burden of showing by clear and convincing evidence that misconduct of the defendant prevented them from fully and fairly presenting their case.

Accordingly, the motion for a new trial is DENIED.

APPENDIX C.

Anne ANDERSON, et al., Plaintiffs,

v.

BEATRICE FOODS CO., Defendant.

Civ. A. No. 82-1672-S.

United States District Court,
D. Massachusetts.

December 12, 1989.

Municipal water customers who were allegedly exposed to toxic chemicals released by tannery operator appealed from order of the United States District Court for the District of Massachusetts, denying their motion for relief from judgment entered in favor of operator. The Court of Appeals, 862 F.2d 910, remanded. On remand, the District Court, Skinner, J., held that tannery operator's failure to disclose environmental report relating to groundwater flow at tannery site did not substantially impair plaintiffs' presentation of case precluding new trial.

Relief denied.

. . . . . .

Jan Richard Schlichtmann, Schlichtmann, Conway & Crowley, Boston, Mass., Anthony Z. Roisman, Washington, D.C., for plaintiffs.

Jerome D. Facher, Neil Jacobs, Hale & Dorr, Boston, Mass., for Beatrice Foods and John J. Riley Co.

James Brown, Foley, Hoag & Eliot, Jerry O'Sullivan, Choate, Hall & Stewart, Paul Galvani, Ropes & Gray, Boston, Mass., for W.R. Grace.

FINAL REPORT TO THE COURT OF APPEALS FOLLOWING REMAND

SKINNER, District Judge.

SUMMARY OF PRIOR PROCEEDINGS

In this action plaintiffs claim that they and deceased family members of some of them were poisoned through the negligence of the defendant in causing toxic waste to infiltrate the municipal water supply of the City of Woburn, where the plaintiffs reside. Plaintiffs asserted two theories of liability: (1) defendant negligently permitted others to dump toxic wastes on a parcel of wetland which it owned adjoining the Aberjona River, referred to in prior proceedings as "the 15 acres"; and (2) defendant either dumped toxic wastes from its tannery operation onto the 15 acres or negligently permitted toxic wastes dumped at the tannery site to migrate into the Aberjona Valley aquifer. Municipal wells G and H, which allegedly supplied water to the plaintiffs' households were located across the Aberjona River opposite part of the 15 acres and upstream from the tannery. The relevant polluting chemicals were agreed to be a group of chlorinated hydrocarbons, principally trichloroethylene (TCE) and tetrachloroethylene (PERC), generally referred to in prior proceedings as the "complaint chemicals."[1] The trial of the case was trifurcated. The first stage dealt with the presence on the defendant's properties of the complaint chemicals, the defendant's due care or lack of it, foreseeability of harm to the plaintiffs and migration of the complaint chemicals into the aquifer and thence to wells G and H. After massive and frenetic discovery, the first stage of the trial proceeded before a jury for 78 trial days. During the course of the trial, I directed a verdict on the second branch of plaintiffs' claim ("the tannery case"). The first branch of their claim ("the 15 acres case") was submitted to the jury on special interroga-

[1] These are the commonly used industrial and household cleaning agents.

tories. The jury's answer to the first interrogatory required the entry of judgment for the defendant. In response to plaintiffs' post-verdict objection to the ambiguous form of the interrogatories, I made a finding of fact under Fed.R.Civ.P. 49(a): plaintiffs had not proven by a preponderance of the evidence that the complaint chemicals migrated to wells G and H.

After the entry of judgment for the defendant (which was inexplicably delayed for many months), the plaintiffs fortuitously discovered the existence of two reports of environmental studies of the tannery site which had been made in 1983 and 1985, prior to the trial. (Following the lead of the court of appeals, which found that the second report was a relatively insignificant variant on the first, I shall refer to both reports collectively as "the Report.") Claiming that the Report was a significant document that should have been furnished in response to various discovery requests, plaintiffs moved to set aside the judgment under Fed.R.Civ.P 60(b)(3). In my order of January 22, 1988, 127 F.R.D. 1, appendix at p. 6, I ruled that the Report should have been furnished in response to discovery but that this default did not prevent the plaintiffs from fully and fairly presenting their case. Accordingly I denied the plaintiffs' motion.

The plaintiffs appealed the denial of the Rule 60(b) motion to the court of appeals, wherein an appeal from the defendant's judgment was already pending. The two appeals were consolidated and determined by the court's opinion dated December 7, 1988. *Anderson v. Cryovac*, 862 F.2d 910 (1st Cir.1988). After a comprehensive exegesis, the court affirmed the trial rulings and findings. It retained jurisdiction of the plaintiffs' Rule 60(b) motion but remanded the case to me for further specifically delineated proceedings as follows:

> 1. Conduct of an evidentiary hearing and determination whether the defendant, acting alone or in concert

with the Riley interests, knowingly or intentionally concealed the Report.

2. Decision, after "an orderly presentation from all parties," "whether lack of access to the Report substantially interfered with plaintiffs' efforts to prepare and present a case as to the nexus between the tannery and the pollution of wells G and H." Plaintiffs would be entitled to a presumption of substantial interference if the defendant's conduct had been found to be knowing, deliberate or intentional.

3. Formulation of recommendations to the court of appeals as to what remedy, if any, to which the plaintiffs are entitled. (I assume from the court's preceding discussion that these recommendations should specifically address the plaintiffs' demand for a new trial, or at least for the opportunity for further discovery.)

4. Recommendation "as to the appropriateness *vel non* of sanctions anent any unexcused discovery violations."

Pursuant to the mandate from the court of appeals, I held hearings during the first three months of 1989 on the subject of the defendant's misconduct. On July 7, 1989, I made a finding that John J. Riley and his attorney had engaged in "deliberate misconduct" which was attributable to the defendant, thus entitling the plaintiffs to a presumption that the nondisclosure of the Report substantially impaired their preparation for trial. 127 F.R.D. 1 (1989). This finding was submitted to the court of appeals.

I thereafter determined that resolution of the question of substantial interference would be facilitated by the testing of the tannery site for the presence of the complaint chemicals by an independent expert appointed by the court under Federal

Rule of Evidence 603, to be paid for by the defendant as a partial sanction for its misconduct. After first agreeing to this procedure, the plaintiffs withdrew their agreement, refused to participate in the process for the selection of the independent expert and continuously objected to this plan. I nevertheless went forward with the appointment of the independent expert until it appeared that alterations in the topography of the tannery site since the time of the trial would require the drilling of new test wells, which would have taken many months longer and cost much more than had been originally suggested. On September 1, 1989, I then cancelled the whole program by an order from the bench. My orders dated July 14, July 25 and September 8, 1989, which delineate the course of these events, are attached hereto as Appendices, A, B, and C.

Thereafter both parties sought discovery. Most of their requests were denied, on the theory that sufficient discovery had taken place to permit both parties to fully try the next stage of the case. The plaintiffs sought an order compelling the defendant to search a warehouse full of miscellaneous business records of the tannery. In my view, as a result of the January-March, 1989, hearings, plaintiffs had already obtained all of the documents likely to bear on use and disposal of the complaint chemicals, namely the tannery laboratory records and Mr. Riley's personal file of formulae. The defendant sought to depose plaintiffs' counsel and to obtain counsel's investigative files. As requested this discovery would have been too great an invasion of the attorney's work product and confidential information even for this extraordinary situation. In my view, however, it is undeniable that an understanding of the state of plaintiffs' trial preparation would be material to a determination of whether plaintiffs' trial preparation had been substantially impaired. Since the defendant had the burden of rebutting the presumption in the plaintiffs' favor it was entitled to some form of limited discovery, even though in the ordinary

posture of litigation even a limited invasion of an attorney's files would be improper. Plaintiffs correctly argued that revelation of their investigative methods and the names of persons who had been interviewed would seriously prejudice them if in fact a new trial were to be ordered. Accordingly I ordered the plaintiffs' counsel to furnish his investigative file to me *in camera* with the understanding that I would use it to the extent that I deemed it material but would not show the documents to the defendant. Plaintiffs' counsel complied with this order over protest, and I have in fact used the material in his notebook in arriving at my decision, as shall hereinafter appear.

Mr. Riley and Ms. Ryan then moved for reconsideration of my findings of July 7, 1989. Those motions were denied from the bench, and my subsequent memorandum on the subject appears as Appendix D hereto.

FINDINGS AND RECOMMENDATIONS RE SUBSTANTIAL INTERFERENCE WITH PLAINTIFFS' TRIAL PREPARATION

1. *The Tannery Case*

On October 16, 1989, I commenced seven days of hearings on the issue of substantial interference with the plaintiffs' trial preparation. Plaintiffs had the benefit of a presumption that the failuire to produce the Report constituted substantial interference. To rebut this presumption the defendant offered various documents, many of which were already part of the record, tending to show (a) that the information contained in the Report relative to ground water flow was available from other sources and (b) that the evidence in the defendant's possession clearly indicated that there was no disposal of the complaint chemicals at the tannery site. Counsel pointed out that plaintiffs had not monitored Riley production well no. 1 during the pump test of wells G and H and asked me to infer from that fact that

plaintiffs would not have been sufficiently interested in the tannery site to monitor the test wells revealed in the Report even if they had known about them. The defendant also introduced evidence of soil testing of the tannery site in July and August of 1986 which revealed none of the complaint chemicals. There were sufficient indications of changes on the site, however, to cast doubt on the probative value of these reports, and I have not relied upon them in arriving at my conclusions, except as minimally corroborative of other evidence. I did rely on the plaintiffs' investigative notebook referred to above and treated it as evidence submitted by the defendant even though defendant's lawyer was not permitted to inspect it. Its contents were, of course, well known to plaintiffs' counsel. In my opinion, these materials rebutted the presumption in favor of the plaintiff by clear and convincing evidence, for reasons which I will explain in detail later on in this report.

At that point I had not reviewed the defendant's evidence and accordingly reserved judgment on plaintiffs' motion for a finding of substantial interference on the basis of the presumption in their favor. Since in the event that defendant's evidence proved sufficient to rebut the presumption the plaintiffs still had the ultimate burden of proving substantial interference, the plaintiffs offered the testimony of Professor Sykes, an expert hydrogeologist, Mr. Raboin, a technical specialist in polymer sciences at the University of Massachusetts, and Dr. De Cheke, an analytical chemist and pharmacist. I admitted the testimony of Professor Sykes but excluded the testimony of Raboin and De Cheke. I permitted the plaintiffs to make an extended offer of proof of their proffered testimony concerning trial exhibit WBARZ' ("Ex. Z' "). The original history and subsequent consideration of Ex. Z' require extended separate discussion, and I shall explain my exclusion of the testimony when I reach that point in this memorandum.

(a) *The hydrogeological significance of the Report*

Dr. Sykes' testimony would warrant a finding that the Report, together with the other hydrogeological information available to the plaintiffs, would have enabled the plaintiffs expert to draw the following conclusions:

> 1. The geological barrier between the Aberjona Valley aquifer and the upland at the tannery site was some distance west of the railroad tracks, further west than indicated on plans prepared by defendant's experts.
> 2. There is a subsidiary aquifer carrying ground water underneath the tannery site and flowing in an easterly direction toward the river more or less following the course of a swale which is visible on the surface. Because the subsurface gradients at this point are relatively steep, the velocity of the easterly flow is comparatively great, sufficient to carry ground water pollutants at the tannery site into the main stream of the Aberjona Valley aquifer.
> 3. Under ordinary conditions any such flow of pollutants would have been carried southward by the natural course of the aquifer. This flow extended far enough to the east, however, so that pollutants would have been within the cone of influence of wells G and H when they were pumping and thus drawn into the City of Woburn's water supply.

In my opinion this testimony, if believed, coupled with the opportunity to monitor existing test wells at the tannery site during the December, 1985 pump test, would have been important to the preparaiton of a "tannery case." It is no answer to say that the plaintiffs' hydrogeologist should have figured all of this out on his own. It follows that failure to produce the

Report would have substantially impaired the plaintiffs' presentation of a "tannery case" if, in fact, there had been any "tannery case" which this information could legitimately have supported.

(b) Investigation, discovery and trial of the "tannery case"

In argument before me on October 17, 1989, the plaintiffs' counsel provided a key to the understanding of the so-called "tannery case":

> Mr. Facher said today that our position was we had unauthorized disposal at the 15 acres and we were trying like hell to get the tannery involved in that disposal operation because Mr. Facher, Hale & Dorr, and Beatrice, knew as the plaintiffs knew that a case of unauthorized dumping, third party dumping, dumping by strangers at unknown times, that is a much harder case than a case which involves direct disposal, direct knowledge of the property owner itself, and in this case the tannery. It is much better to have a Grace case where the employees dump their own stuff than it is to have a case which someone came at some time and dumped, and did the property owner know about it.
>
> * * * * *
>
> My discovery was my attempts to find out what did I have as evidence to make my case. The sum total of what I had at the end of all the discovery and all the bellyaching and relaxation therapy, the end of the process that cost millions of dollars, thousands of hours, and scores of people, was I put on the best case I thought I had, which was an unauthorized disposal case, and the only connection that I felt I could credibly present to a jury which I had facts

> about was the tannery dumping on the side of the hill, the stuff coming down, the stuff at the 15 acres Mr. Dobrinski [the plaintiffs' geologist] said was tannery waste [Ex. Z'], that was the only link.

Counsel's statement accurately reflects plaintiffs' strategy and the state of their case with respect to disposal of the complaint chemicals at the tannery site. Prior to trial, private investigators engaged by the plaintiffs interviewed scores of people, including many employees and former employees of the tannery, suppliers of chemicals to the tannery and residents and former residents of the Salem Street are in the vicinity of the tannery.

On February 14, 1986, as the trial was beginning, plaintiffs' principal investigator reported,

> Our inquiries to chemical suppliers and toxic waste haulers that have done business with Riley did not uncover evidence that the tannery had been using chlorinated solvents [i.e., complaint chemicals] in addition to those already acknowledged by John J. Riley, Jr.

The use of complaint chemicals acknowledged by Riley consisted of

> (1) the use of a fuel additive called 7D-24 containing 2% PERC, which was totally consumed by combustion; and
> (2) the use of a mixture of silicone and PERC used to waterproof leather for army boots in the late 1960's which was recycled in the spraying device until it was used up, leaving no waste to be disposed of.

The investigator's summary accurately reflected a thorough and well-documented inquiry. In fact, in April of 1985 one supplier of industrial chemicals told the investigator that the complaint chemicals "do not belong in the leather industry."

All of the many employees and former employees of the tannery interviewed by plaintiffs' investigators stated that they knew of no use of the complaint chemicals, and the former chemical processor for the tannery said that TCE and toluene were not used. The investigator reported that one former employee said that he believed that TCE was used for cleaning, but when that employee was deposed by the plaintiffs on October 11, 1985, he testified that TCE was not used at the plant.

Many residents and former residents of the Salem Street area were interviewed. They all said that they had observed considerable use of the access road to the 15 acres by third parties and the dumping of the contents of old barrels by the Whitney Barrel Company, but they had never seen any dumping of material from the tannery on the 15 acres or use of the access road by tannery personnel.

Notwithstanding the fact that his own investigative file contained no support whatsoever for the claim of disposal of the complaint chemicals at the tannery site, or by the tannery on the 15 acres, and significant positive evidence to the contrary, plaintiffs' counsel pressed his claim of tannery dumping at trial. He was permitted to introduce evidence of the overflow of a grayish-white material from the tannery's sedimentation pond running down the hillside to the 15 acres, and of various instances of overflow from the tannery's connections to the municipal sewer system. There was no evidence that any of this material contained any of the complaint chemicals. This evidence was admitted on the basis of counsel's representation that it would be tied into evidence of the disposal of complaint chemicals. This tie-in never materialized. Various employees of the tannery were called as witnesses, including Mr. Kaine,

the production manager, and were examined exhaustively concerning the use of PERC in waterproofing boot leather, the process referred to in the investigator's report. They all testified that all of the coating material was absorbed in the leather, and that there was no disposal of complaint chemicals at the tannery site. This testimony was never contradicted or impeached in the course of the trial.

Plaintiffs' main evidence was the testimony of Dobrinski, the plaintiffs' geologist, that he had found a reddish-brown "peatlike" substance on the 15 acres near test well #3. This material was tested on behalf of both parties and found to be substantially saturated with several complaint chemicals. It was admitted in evidence as plaintiffs' Ex. Z'. Dobrinski stated that in his opinion the substance was tannery waste, specifically sludge which had escaped from the sedimentation tank next to the tannery. In my opinion this testimony had insufficent probative value, standing unsupported as it did, to warrant the submission to the jury of the plaintiffs' claim of tannery dumping, for the following reasons:

> (1) Dobrinski is a geologist with no training or experience in leather manufacture, whose opinion was completely lacking in foundation.
> (2) Ex. Z' did not bear any resemblance to the tannery sludge introduced in evidence. Tannery sludge is dary gray in color, coarse and gritty in texture and smells strongly of cow manure. Ex. Z' is rust colored, fine textured and rather mush, and does not smell of manure.
> (3) No evidence of a chemical analysis of Ex. Z' was introduced except with respect to the presence of complaint chemicals.

I conclude from the foregoing that at the time of the commencement of the trial, throughout the trial and at the time

that plaintiffs' motion for a new trial was filed, plaintiffs' counsel knew that there was no available competent evidence tending to establish the disposal of complaint chemicals by the defendant itself, either at the tannery site or on the 15 acres.

(c) Further consideration of Ex. Z' and related materials

During the course of the hearings of January-March, 1989, plaintiffs' counsel learned that some three cubic yards of material similar to Ex. Z' had been found near test well #3 on the 15 acres, that most of it had been removed by tannery employees but that some of it remained on the site. Counsel and an associate then went to the 15 acres and scooped up two more samples of rust colored material which they submitted to a chemist for analysis. I permitted the chemist to testify, notwithstanding the looseness of this procedure, accepting counsel's representation in lieu of the usual testimony regarding custody and non-contamination. The samples were not analyzed for non-volatile organics, but were analyzed for volative organics such as the complaint chemicals. Ex. Z' was found to contain concentrations of the complaint chemicals, *but the two samples of supposedly similar material collected by counsel did not*. All three samples contained heptanol, a relatively uncommon industrial compound which is not used in the tanning of leather, but is used as a precursor in the formation of alcohols. All three samples contained various acids and unidentified ketones, a class of acetates widely used in industry, but not identified as the ketones used in tanning.

Thereafter at my suggestion the parties caused the non-volatile organic material in these samples to be analyzed. Expert #1 testified for the plaintiffs that the material was animal fat. Expert #2 testified for the defendant that the material was probably a by-product of the manufacture of polyvinyl chloride. As set forth in some detail in my findings of July 7, 1989, Expert #2 was in my opinion more persuasive, and I

found accordingly. In my July finding I overlooked the testimony about the presence of heptanol in all three samples, but this evidence tends to support Expert #2.

The matter of Ex. Z' did not rest there, however. In July of 1989 plaintiffs' counsel learned that the new lessees of the tannery site were dismantling the plant. He again went to the site with an associate, and by means of a pipe inserted through a chain link fence surrounding the site extracted a reddish-brown substance from the bottom of one of several four-wheeled canvas pushcarts lined up against the fence. Although plaintiffs' counsel repeatedly referred to this material as "sludge," it clearly was not sludge for the reasons stated above, but it did bear at least superficial resemblance to Ex. Z' and the other two samples. Walter Sorenson, a former tannery employee who had been hired by the new lessee of the site to dismantle the plant, testified that these pushcarts were used to transport hides and pieces of leather around the tannery, and the substance obtained by counsel was detritus which had accumulated over time in the bottom of the carts.

During the October-November, 1989 hearings, as noted above plaintiffs offered the testimony of two more scientists, Experts #3a and #3b, whose testimony I excluded. I permitted plaintiffs to make an extended offer of proof in the form of a voir dire examination of the experts themselves. Even though they were considerably more dazzling and persuasive than Expert #1, I persisted in my decision to exclude their testimony for the following reasons:

> (1) Both parties had already presented evidence on the issue of the nature of Ex. Z', and I had made a finding on the subject, which under familiar rules precludes further litigation. A party who losses with his first chosen witness can not keep returning to the fray with new witnesses until he finds one who pre-

vails. I am virtually certain that there exists somewhere potential Expert #4, waiting to testify that the methods used by Experts #3a and #3b were improper. At some point there must be closure.

(2) Doubtless a court has the power in a proper case to reopen testimony on issues of fact already decided, notwithstanding the foregoing considerations. In my opinion this is not a case calling for a departure from this salutary rule of repose. Given the state of the evidence as it now appears, even if I accepted the opinions of Experts #3a and #3b, and found that Ex. Z' not only was made of animal fat, but was chemically the same as the detritus found in the tannery pushcarts, there would still be no basis for a case of disposal of the complaint chemicals by the defendant. The salient evidence is as follows:

(a) While Ex. Z' contains the complaint chemicals, the other samples of the same material do not.

(b) The detritus contained in the tannery carts does not contain any of the complaint chemicals.

(c) There is no evidence of disposal of the complaint chemicals by the tannery and significant evidence that no such disposal occurred.

(d) There was abundant evidence that third parties were dumping large quantities of the complaint chemicals indiscriminately on the 15 acres.

In my opinion this evidence in the aggregate virtually compels the conclusion that the saturation of Ex. Z' was the result of indiscriminate dumping by third parties and not the result of disposal of complaint chemicals by the defendant. At the very least, no rational trier of fact could find the contrary to be more probative than otherwise. In the present posture of the case, therefore, the proffered testimony of Experts #3a and #3b has become immaterial.

As a result of the foregoing analysis, I conclude that even with all of the post-trial revelations, including the tannery laboratory reports and formulae and the expert testimony, both admitted and proffered, there is still no available competent evidence tending to prove that it is more probable than otherwise that the defendant disposed of the complaint chemicals at either the tannery site or on the 15 acres. While the Report might well have been very helpful to the plaintiffs in establishing the transport of chemicals from the tannery to wells G and H, in the absence of any evidence of disposal of the complaint chemicals at the site, it is no help at all. The finding in the Report of less than one part per billion of one of the complaint chemicals not otherwise associated with the tannery in one of the test wells is not significant according to the testimony of Margaret Hanley, who was the author of the Report, and in these last hearings the plaintiffs have not argued that it was.[2]

(d) Conclusion

[1] Reaching a conclusion on this branch of the case requires a divination of what the court of appeals had in mind in establishing its rule of substantial interference, generally delineated as follows:

> Under a substantial interference rule as we envision it, a party still need not prove that the concealed material would likely have turned the tide at trial. Substantial impairment may exist for example, if a party shows that the concealment precluded inquiry

[2] There was evidence of complaint chemicals in the waste water from the tannery. This water was drawn initially from Riley well #2, however, which was conceded to have been contaminated by the heavy concentrations of complaint chemicals on the 15 acres and by the Aberjona River itself, which was similarly polluted from other sources upstream. This evidence is not probative of disposal at the site.

> into a plausible theory of liability, denied it access to evidence that well could have been probative on an important issue, or closed off a potentially fruitful avenue of direct or cross examination. [Citations] 862 F.2d at 925.

Neither the Report nor the other concealed material which surfaced during the recent hearings would have turned the tide at trial, in view of the dearth of evidence of disposal. I am at a loss to see how this material could have led in any way to development of evidence of disposal of the complaint chemicals, even though it clearly would have significance if such evidence had otherwise been available. In view of what I now know of plaintiffs' pretrial investigation, the possibility that soil testing of the tannery site would have proved fruitful seems remote. (Certainly plaintiffs' counsel showed no enthusiasm for the opportunity offered in the summer of 1989.) Accordingly, notwithstanding my uncertainty concerning the intent of the court of appeals, I concude that concealment of the Report and other material did not constitute substantial interference with the preparation of a tannery case, where the essential predicate of such a case — use and disposal of the complaint chemicals by the defendant — was significantly negated by the evidence developed by the plaintiffs themselves in the course of pretrial investigation and discovery, and has never been otherwise established.

Whether or not I have correctly applied the standards specified by the court of appeals in arriving at the foregoing conclusion, it would appear that my duty to recommend whether the plaintiffs are entitled to any remedy, specifically the vacation of the judgment and a new trial in whole or in part, is a separate and discrete obligation. I have no uncertainty on this point. The chance that a viable "tannery case" could be developed in any further proceedings is virtually nonexis-

tent, even if the plaintiffs were entitled to try. In my opinion, a new trial on the issue of the pollution of wells G and H resulting from disposal of the complaint chemicals at the tannery site would be pointless, wasteful and unwarranted. I respectfully recommend that the court of appeals should not order a new trial with respect to disposal of the complaint chemicals by the defendant either at the tannery site or on the 15 acres.

2. *The 15 Acres Case*

While the court of appeals clearly remanded this matter specifically for consideration of the impact of concealment of the Report on a potential "tannery case" and indicated that exploration of the 15 acres case was foreclosed by the trial findings, plaintiffs nevertheless insist that Professor Sykes' testimony requires retrial of the 15 acres case. With respect to the 15 acres, the plaintiffs had evidence that the soil and ground water were heavily polluted by the complaint chemicals, that dumping by others of toxic materials on the 15 acres was known to the defendant, that harm to people in the plaintiffs' position was reasonably foreseeable and, through the testimony of Dr. Pinder, that the complaint chemicals were transported by ground water flow from the 15 acres to wells G and H. The evidence of foreseeability was very questionable, but I resolved this close call in favor of the plaintiffs. Accordingly, I ruled that this evidence was legally sufficient to be submitted to the trier of fact.

When, after the jury had made a finding of fact for the defendant, I became a finder of fact under Rule 49 with respect to the transport of pollutants by ground water flow, I found as a fact that transport of the complaint chemicals had not been proven by a preponderance of the evidence. I rejected Dr. Pinder's opinion because he did not account for water

missing from the Aberjona River and because evidence of the gradients opposite the 15 acres did not support his conclusions.

Professor Sykes' opinion does not in my view cast any cloud upon the correctness of this conclusion, but on the contrary tends to confirm it. He testified that the subsidiary aquifer running under the tannery property would have had relatively little effect on ground water flow north of Riley well #2, where most of the pollution was located. More importantly, he testified that Dr. Pinder had been mistaken in his conclusion that the river bed was impermeable and that the river did not substantially contribute to the water pumped by wells G and H. According to Professor Sykes, over half of the water pumped by wells G and H was water from the Aberjona River, which was known to be heavily contaminated by industrial waste, including the complaint chemicals. He further contradicted Pinder by identifying the river as a "charge boundary" impeding the flow of ground water from west to east. Professor Sykes also confirmed Dr. Guswa's testimony that the wells were supplied with contaminated water from the north by the heavy southward flow on the east side of the river. The testimony strongly confirms the factual conclusion which I made under Rule 49(a). The evidence does not establish the probability that the complaint chemicals in the wells came from the 15 acres.

No matter how heartbreaking were the plaintiffs' losses, nor how wrongful the conduct of the powerful defendant corporation, the law requires proof of an efficient causal connection between the conduct and the loss to establish liability. In the absence of such proof, the plaintiffs could not prevail.

Accordingly, I find that concealment of the Report did not substantially impair preparation of the 15 acre case and that the case was correctly decided. I respectfully recommend that no new trial be granted with respect thereto.

RECOMMENDATIONS WITH RESPECT TO SANCTIONS

[2] The plaintiffs have moved for a default judgment and assessment of damages as a sanction for the concealment of the Report and other documents, and for what they assert has been the perfidy of the lawyers associated with the defense. This would indeed be an extraordinary remedy in view of the fact that plaintiffs have still to prove, among other things, that the concentration of complaint chemicals in the water delivered to the plaintiffs was likely to have been the efficient cause of their many grievous losses. Sanctions generally are intended to deter unacceptable conduct, not compensate the opposing party. *Thomas v. Capital Security*, 836 F.2d 866 (5th Cir.1988). See *Pavelic & LeFlore v. Marvel Entertainment Group, et al.*, ___ U.S. ___, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989). One of the sanctions available under Fed.R.Civ.P. 37 for the failure to provide discovery is the prohibition of the introduction of evidence relating to the object of the discovery by the delinquent party. This sanction is ordinarily applied before trial, and it is difficult to envision its retroactive application after the case has been tried.

The discovery process is at the heart of federal trial practice, however, and deliberate interference with it is a matter ordinarily deserving of a significant sanction if an appropriate sanction could be devised.

The problem in this case, however, is that the honors for sanctionable conduct are about evenly divided. Plaintiffs were entitled to persevere in the prosecution of any claims for which there was an objective basis in fact and law. Plaintiffs implicitly and explicitly represented at trial and through these extensive post-trial proceedings that there was a basis in fact for the assertion that the defendant disposed of the complaint chemicals at the tannery site or on the 15 acres. At least by the close of his investigation and discovery, however, plaintiffs' counsel knew that there was no such basis in fact. Continued prosecu-

tion of the claim at that point was a violation both of Fed.R.Civ. P. 11[3] and 28 U.S.C. sec. 1927.[4] *Greenberg v. Hilton International Co.*, 870 F.2d 926 (2d Cir.1989); *Thomas v. Capital Security, supra.*[5] It may well be that counsel was genuinely motivated by an earnest desire to serve his clients, who indeed have suffered grievous losses, but fomenting expectations without a factual basis does not serve the clients' best interest anymore than it serves the judicial process.

In the convoluted context of this case, it is my recommendation that neither party should profit through sanctions from

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[3]Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonably inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

[4]Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs. June 25, 1948, c. 646, 62 Stat. 957.

[5]More latitude should be allowed at the beginning of a case for a claim based on information and belief, but so far as appears plaintiffs did not have even the benefit of rumor, whisper, or even an anonymous tip. The entire exercise was apparently purely for forensic advantage.

the delinquency of the other, and that should be the sanction for both of them.

SUMMARY

It is my recommendation that all pending motions be denied.

APPENDIX A

PROCEDURAL ORDER

July, 14, 1989

In my view the question of whether the interference with plaintiffs' discovery was "substantial" will likely be most economically and effectively resolved by the following procedure. In order to be reliable, however, this procedure must be carried out with absolutely no publicity and maximum possible security to avoid interference with the process by possible well-intentioned but misguided third parties. The parties agreed to the secrecy of the procedure as outlined in the transcript of a conference with counsel held today. One copy of this transcript may be made available to each party, but it shall not be duplicated or otherwise distributed in any way, nor shall it otherwise be made public until further order of the court.

It would be possible to resolve the issue of substantial interference by taking testimony as to what who would have done when if they had only known what they now know and what effect it might have had on the conduct of the case. Past experience with this case suggests that any such hearing may be protracted and ultimately unsatisfactory.

What is really at the heart of the issue of substantial interference, as defined by the court of appeals, is the factual issue of whether there is any significant amount of the complaint chemicals in the soil or ground water of the tannery property.

In accordance with the discussion with counsel held today the court will appoint its own pair of experts, one to take an agreed number of soil and ground water samples at points on the tannery property designated by the plaintiffs, and a second to analyze the samples. The cost shall be borne by the defendant as a partial sanction under Fed.R.Civ.P. 37(d) for having caused all this trouble. The experts shall be the court's experts under Fed.R.Evidence 614, however, and shall report directly to the court. The parties shall have the right to cross-examine the experts as provided in the rule.

The experts shall be chosen in the following manner. Each party shall submit to the court the names of three experts of each type by July 24, 1989, at 10 a.m., together with material establishing the competence and independence of each. I will then select the experts who appear to be the most competent and unbiased. I reserve the right to reject them all and require a new submission. I am not likely to be very enthusiastic about experts who have previously worked for the parties in this litigation.

This procedure requires a fair level of cooperation between the parties. Any breach of security before the samples are taken will have the result that positive findings may not be deemed reliable.

If the testing shows the existence of significant amounts of complaint chemicals in the tannery soil or ground water it is likely that I would rule the interference with the plaintiffs' discovery to be substantial, and the reverse if the testing is negative. If the test results are ambiguous, of course, further hearings will be required.

The parties reserve the right to move for expansion of the scope of these hearings, to appeal any rulings of mine based upon the results of the testing above described and to seek additional relief from the court of appeals. Participation in the testing procedure will not operate as a waiver of any of the rights of the parties.

APPENDIX B

ORDER APPOINTING EXPERTS UNDER FEDERAL RULES OF EVIDENCE 614

July 25, 1989

Pursuant to the order of July 14, 1989, counsel for the parties met with the court on July 24, 1989 to consider the appointment of experts to test the soil and ground water of the tannery property. Despite his apparent oral agreement on July 14 with the plan suggested by me, plaintiffs' counsel has concluded that he should not participate in the selection of a court-appointed expert, for reasons noted in a written objection and amplified on the transcript of the conference. The most significant of them is the requirement which I imposed of secrecy, which plaintiffs' counsel correctly argues impinges on his duty to his clients. There are twenty-eight plaintiffs, however, which complicates this issue of security. In my opinion, the limited impingement which I have imposed is justifiable to insure the integrity of any test which is carried out for the reasons stated in my order of July 14, 1989. The plaintiffs accordingly decided to propose their own experts. The defendant proposed the names of three experts to test the soil and ground water and from EPA certified laboratories to analyze the samples. Since the plaintiffs had elected not to submit candidates, I offered plaintiffs' counsel the option of making the selection from the list submitted by the defendant. He declined.

Accordingly, after review of the qualifications and availability of the nominees submitted by the defendant, I appoint Richard T. Dewling, chairman and chief executive officer of Metcalf & Eddy Technologies, Inc. to take appropriate samples of the soil and ground water of the tannery property. I appoint

York Laboratories, 200 Monroe Turnpike, Monroe, Connecticut to be the laboratory to analyze the samples taken by Mr. Dewling. Mr. Dewling and York Laboratories shall be the court's experts under Federal Rules of Evidence 614. They shall be subject to cross-examination by the parties as provided in the rule.

Their charge will be to make as fair and comprehensive a test of the soil and ground water as is necessary to determine the presence in the soil and ground water of any of the chlorinated hydrocarbons which are the subject of this case and which were not disclosed to the plaintiffs in the course of discovery. Mr. Dewling shall have access to all reports of prior tests of the tannery property, and counsel for both parties may meet with him together to specify with reasonable particularity what areas are to be tested. Mr. Dewling shall also do whatever else may in his judgment be necessary to provide a comprehensive report, including the sampling of waste materials in containers. Counsel for both parties may be present during every stage of the sampling process and shall have a full opportunity to observe the actual operation.

Mr. Dewling must personally supervise the taking of samples and their transportation to the York Laboratories and be prepared to testify as to the integrity of the testing procedure.

Upon completion of the sampling procedure, all requirements of secrecy shall be lifted and all hitherto impounded orders and transcripts shall be released and available to the public and the press. In the meantime, however, this order, the responses of the parties and the transcript of the conference of July 24 shall be impounded, available only to counsel for the plaintiffs, counsel for the defendant, and Mr. O'Sullivan, who has now appeared for Mr. Riley and his corporations.

Following completion of the report I will schedule the hearing directed by the court of appeals, the nature and scope of which will be determined in part by the contents of the experts' reports.

In my view, the result of the sampling and testing of the tannery property will be a significant consideration in the resolution of the issue of substantiality of interference. Accordingly, I deem the foregoing procedure to be the first step in the "orderly presentation" mandated by the court of appeals.

APPENDIX C

ORDER ON VARIOUS MOTIONS

September 8, 1989

A. *Motion to Disqualify Defense Counsel*

Plaintiffs have moved to disqualify Hale & Dorr as counsel for the defense. The purported reasons for doing so are an alleged conflict of interest and the law firm's failure to obey the orders of the court. Plaintiffs rely on *Kevlik v. Goldstein*, 724 F.2d 844 (1st Cir.1984). That case holds that a party has standing to raise a conflict of interest involving another party, and the district court has broad discretion to disqualify counsel in an appropriate case. In the *Kevlik* case, an attorney for a defendant had previously represented another plaintiff named Southmayd, and had received a confidential communication from Southmayd which might reasonably be assumed to bear on Kevlik's position as well as Southmayd's. The court of appeals affirmed the district court's order of disqualification.[1]

There is nothing even remotely resembling the *Kevlik* case in the present record. Plaintiffs' argument is that counsel will not be forthright about the defendant's alleged defaults in order to protect the firm of Hale & Dorr. I have not observed any ten-

[1] The court also noted a *caveat:* "We are aware that disqualification motions can be tactical in nature, designed to harass opposing counsel, and have, therefore, kept in mind that 'the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.' " 724 F.2d at 848.

dency on the part of Messrs. Facher and Jacobs to protect themselves improperly. Both have voluntarily taken the stand in the misconduct hearings and submitted themselves to cross-examination. Plaintiffs' counsel declined to cross-examine Attorney Facher.

Plaintiffs attack defense counsel for failure to obey the court's orders with respect to supplementation of answers to interrogatories and in the submission of nominees for court-appointed expert. It is my opinion that plaintiffs' asservations reflect an exaggerated view of opposing counsel's obligations.

A few salient facts should be kept in mind:

1. The tannery has not been owned by the defendant since 1983 and it has no control over the property.
2. While the property is owned in effect by John J. Riley, who may have some continuing obligations even now under the repurchase agreement with Beatrice, the property is in the possession of lessees who have no obligation whatsoever and over whom the defendant has no control.
3. The trial in this case terminated in August, 1986 with a decision for the defendant, which remained unchallenged for over a year. There was no obligation on the part of anyone to preserve the property unchanged, and those in possession had the right to make whatever changes were deemed desirable in the course of their business.
4. The court has ruled that the repurchase agreement imposed upon defense counsel the obligation to make reasonable inquiry of Riley and his employees through their attorney. Neither this court nor the court of appeals imposed upon counsel the obligation to conduct field investigations.
5. The fact that a building had been built on part of the tannery, and that the tannery had closed was well

known to all parties by January, 1989. The plaintiffs should have expected that the manufacturing property would be liquidated in the ordinary course of business. Defense counsel were not obliged to monitor and report on every stage of the operation.

6. The selection of Metcalf & Eddy as court-appointed expert was proper in all the circumstances. Plaintiffs were given the opportunity to nominate three experts; failing that they were given the opportunity to select from the three nominees proffered by the defendant. They defaulted on both oppprtunities. Hale & Dorr represented that Metcalf & Eddy had no connection with the parties. As far as I know, this was a true representation by Hale & Dorr made after reasonable inquiry. It turns out that one of several thousand Metcalf & Eddy employees was a former employee of Yankee Engineering. This was not known to Hale & Dorr and could only have been discovered by a check of the personnel files of Metcalf & Eddy. The obligation to submit the names of impartial experts did not include the obligation to do such a check of its employees.

For the foregoing reasons, I am satisfied that Hale & Dorr has performed its obligation to the court and made the reasonable inquiries required. There is absolutely no reason for the court to interfere in the defendant's choice of counsel.

B. *Motion To Compel Further Discovery*

For the reasons stated above this motion is denied.

C. *Defendant's Motion for Reconsideration of Discharge of Court-Appointed Expert*

This motion is denied, but not for the reasons stated in plaintiffs' opposition. Mr. Dewling, the chief executive officer of Metcalf & Eddy, should have revealed Mr. Hagger's previous connection with Yankee as a matter of form, but I am satisfied that Hagger's present association with Metcalf & Eddy does not impeach Mr. Dewling's credentials as an independent expert. There is no evidence that Yankee Engineering was engaged in any collusion with the defendant or Riley or that Hagger has any conceivable present interest in this litigation. The incendiary rhetoric in plaintiff's opposition is unjustified, and the statement that on September 1, 1989 I disqualified Dr. Dewling is not true.

My reason for vacating the order appointing the court's expert is that it now appears that the comprehensive investigation which I intended cannot be completed for another two and one-half months, and will cost nearly half a millions dollars. When the order was entered in July, I expected that I would have a report by now. Under the present schedule, I would not be in a position to report to the court of appeals until the first of next year. This is hardly the expeditious completion of the inquiry mandated by the court of appeals.

I agree with the defendant that completion of the study would greatly facilitate the rational termination of the present inquiry. If a new trial were to be ordered this study would save the plaintiffs considerable time and expense, since the cost of the court-appointed expert was to be borne entirely by the defendant as a sanction for the misconduct described in my memorandum of July 7, 1989. If both parties assented, I would still consider pursuing the investigation. Surprisingly, however, the plaintiffs declined to participate in the selection of an expert, complain about the expert who was selected and

now oppose any continuation, notwithstanding their prior insistence that they wanted to learn the truth about the tannery. So be it.

In the absence of the assent of the parties I feel obliged to proceed expeditiously as directed by the court of appeals. I must also reject the defendant's suggestion that a less than comprehensive testing might be accomplished in less time. If the examination were to be less than comprehensive, it would be of no value in the present posture of the case.

Summary

Plaintiffs' motion to disqualify Hale & Dorr, plaintiffs' motion to compel further discovery, and defendant's motion for reconsideration of the order discharging the court-appointed expert are all DENIED.

The clerk shall forthwith assign a time for a conference to schedule the next stage of these proceedings as mandated by the court of appeals.

APPENDIX D

MEMORANDUM ON MOTIONS OF JOHN J. RILEY ET AL. AND ATTORNEY MARY RYAN FOR RECONSIDERATION AND MOTION OF ATTORNEY MARY RYAN TO PARTICIPATE IN HEARINGS ON SANCTIONS

December 4, 1989

The above captioned motions were denied by me from the bench on November 15, 1989, with a summary explanation. Since there appears to be some confusion about my reasons for doing this, I restate them in the following exegesis.

John J. Riley and his former attorney, Mary Ryan, have moved for reconsideration of my Findings Pursuant to Remand

filed in this case on July 7, 1989. 127 F.R.D. 1. I found, among other things, that Mr. Riley and Ms. Ryan had engaged in "deliberate misconduct" as defined by the court of appeals in *Anderson v. Cryovac*, 862 F.2d 910 (1st Cir.1988) by failing to produce certain reports in response to discovery requests. I did not find that the misconduct of Messrs. Facher and Jacobs, attorneys for the defendant, was "deliberate" as so defined.

My finding of "deliberate misconduct" provided significant advantage to the plaintiffs over the defendant in the next stage of the proceedings. The defendant has not moved for reconsideration. Neither Mr. Riley nor Ms. Ryan are parties to this action and they have no standing to seek relief from any findings or orders which establish the rights of the parties. Both Mr. Riley and Ms. Ryan claim, however, that they are entitled to protect themselves from potential sanctions for "deliberate misconduct." The court's power to impose sanctions for misconduct of the sort involved in this case is derived from Fed.R.Civ.P. 11, 26(g) and 37(d). Sanctions under those rules are to be imposed upon parties and their attorneys. Mr. Riley is not a party and Ms. Ryan is not an attorney for a party. No sanctions can be imposed upon them in these proceedings. Ms. Ryan's attorney expressed concern about disciplinary proceedings in another forum. I do not contemplate instituting any such proceedings. In my view "deliberate misconduct" as used in this case is a term of art with a specialized meaning accorded to it by the court of appeals, and does not necessarily implicate conduct meriting professional discipline.

Ms. Ryan's attorney suggested that Ms. Ryan had some due process right to present testimony vindicating herself and shifting responsibility for "deliberate misconduct" to various attorneys for the defendant, including Messrs. Facher and Jacobs. This argument is totally specious, in my opinion, because Ms. Ryan had not only the opportunity but a positive duty to reveal to the court all of the circumstances surrounding the failure of

the defendant and her client to disclose certain reports at an earlier stage in the case.

Following the remand from the court of appeals I conducted seventeen days of hearings from January through March, 1989, to determine if there had been "deliberate miscondcut," and if so, by whom. I specifically ordered Ms. Ryan and Mr. Facher to file comprehensive statements concerning their knowledge of the critical reports, and they both did so. Ms. Ryan was invited to testify, but declined to do so, filing an affidavit in lieu of testimony which substantially replicated her previous statement. Messrs. Facher and Jacobs testified at some length, expanding on the statement previously filed by Mr. Facher. I found the account of their participation in these matters to be credible,[1] and so reported. Ms. Ryan was privy to all of this testimony, and was present in the courtroom for most of it. She made no attempt to contradict Mr. Facher's statement. It was abundantly clear from the tenor of the hearings, as well as from the opinion of the court of appeals, that communications from Riley to the defendant and among their respective lawyers was of critical importance to the determinations ordered by the court of appeals.

Ms. Ryan came forward three months after my findings were filed with an affidavit asserting communications with defendant's attorneys never before revealed, said to be supported by no less than forty-one documents contradicting defendant's attorneys in several respects. No rule of due process

[1] There was a suggestion in the New York Times of December 1 that I made no finding of "deliberate misconduct" with respect to Mr. Facher because (a) he and I attended Harvard Law School together, and (b) he and I are men past the first bloom of youth and Ms. Ryan is a woman "of another era." It is true that Facher and I were at law school "together" in the sense that our time there overlapped, but we were not in the same class, and as far as I know shared no courses. I do not recall any communication with him whatsoever until he tried a case before me in the late seventies. I state categorically that I do not discriminate among attorneys on the basis of age, sex, race, religion or previous law school affiliation.

that I know of permits an attorney in Ms. Ryan's position, under an order to make a complete statement, to withhold information until such time as it is to her advantage to reveal it, and then to insist that the court retry the whole matter. Such a rule would put a premium on strategic concealment, which is what these proceedings are all about, and violate the policy of repose.

Accordingly, I denied all of the above motions.

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1070

ANNE ANDERSON, ET AL.,
Plaintiffs, Appellants,

v.

BEATRICE FOODS CO.,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter Jay Skinner, *U.S. District Judge*]

Before

Torruella and Selya, *Circuit Judges*,
and Bownes, *Senior Circuit Judge*.

Charles R. Nesson, with whom *Jan Richard Schlichtmann* and *Schlichtmann, Conway, Crowley, & Hugo* were on brief, for appellants.

Jerome P. Facher, with whom *James L. Quarles III*, *Neil Jacobs*, *Richard L. Hoffman*, and *Hale and Dorr* were on brief, for appellee.

MARCH 26, 1990

SELYA, *Circuit Judge*. The appeal before us represents yet another march in a litigatory trek of unusual length and complexity. We recount the case's by-now-familiar itinerary and thereafter proceed to blaze what few new trails remain.

I

The litigation concerns claims made by the residents of the Aberjona River Valley in Woburn, Massachusetts. These residents contend that certain toxic chemicals in the city's water supply (the "complaint chemicals") caused a variety of ailments, including leukemia. Plaintiffs' search for the sources of contamination eventually focused upon a 15-acre parcel of vacant wetland lying west and southwest of two municipal water wells (designated "G" and "H"). To the southeast, across a set of railroad tracks, lay a tannery once operated independently by John J. Riley Company ("Rileyco") and later by Riley family members as a division of defendant-appellee Beatrice Foods Company ("Beatrice"). Plaintiffs sued Beatrice and others no longer before the court.

What ensued has been voluminously documented and memorialized at frequent intervals. *See, e.g.*, *Anderson* v. *Cryovac, Inc.*, 862 F.2d 910 (1st Cir. 1988); *Anderson* v. *Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986); *Anderson* v. *W.R. Grace & Co.*, 628 F. Supp. 1219 (D. Mass. 1986); *Anderson* v. *Cryovac, Inc.*, 96 F.R.D. 431 (D. Mass. 1983). We begin our capsulated account by noting that, following drawn-out pretrial proceedings and a protracted jury trial, judgments were entered in Beatrice's favor. *See Anderson* v. *Cryovac, Inc.*, 862 F.2d at 914-15. Plaintiffs appealed. Later, while their appeal was pending, plaintiffs came to believe that grounds existed to set the judgments aside under Fed. R. Civ. P.

60(b)(3).[1] They requested such relief in the district court, asserting that a report prepared for Rileyco in 1983 by an independent consultant, Yankee Environmental Engineering and Research Services, was improperly (and prejudicially) withheld during pretrial discovery.[2] The district court denied the motion. Plaintiffs' appeal was consolidated with their original appeal.

Although we found the appeal on the merits to be unavailing, *see Anderson* v. *Cryovac, Inc.*, 862 F.2d at 915-22, we concluded that additional factfinding was requisite in order to decide the second appeal. Therefore, we retained jurisdiction over that appeal and remanded for a limited purpose:

> On remand, the court must find conduct an evidentiary hearing and determine whether appellee, acting alone or in concert with the Riley interests . . ., knowingly or intentionally concealed the Report. . . . Depending on the outcome of this inquiry, a presumption of substantial interference will or will not arise. . . . In either event, the court should then proceed to receive an orderly presentation from all parties to decide whether the Report . . . is inconsequential vis-a-vis the plaintiffs' claims insofar as they relate to the tannery property. . . .

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[1] The rule reads in material part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore dominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party. . . .

Fed. R. Civ. P. 60(b)(3).

[2] There were actually two reports, neither of which was produced. *See Anderson* v. *Cryovac, Inc.*, 862 F.2d at 922 n.8. We refer to them collectively as "the Report."

> . . . [T]he second-state determination must be whether lack of access to the Report substantially interfered with plaintiffs' efforts to prepare and present a case as to the nexus between the tannery and the pollution of wells G and H. . . . Finally, the district court should formulate recommendations, based on its subsidiary findings, as to whether plaintiffs are in its view entitled to any remedy, and if so, the nature and scope thereof. The court shall also furnish us with a recommendation as to the appropriateness *vel non* of sanctions anent any unexcused discovery violations.

Id. at 932 (footnote omitted).

The district court tackled so thankless a task with incisiveness and vigor. After conducting extensive hearings during the first three months of 1989, Judge Skinner made an initial determination that the discovery infraction comprised deliberate misconduct as we had defined that term of art, *id.* at 925-26, thus entitling the plaintiffs to a rebuttable presumption that nondisclosure of the Report substantially impaired their preparation for trial, *id.* at 926, 930. The judge's findings in this regard were contained in a published rescript, *Anderson* v. *Beatrice Foods Co.*, 127 F.R.D. 1 (D. Mass. 1989), and do not bear repeating.

The district court then commenced seven more days of hearings, ultimately concluding that, while the Report might have been marginally helpful to the plaintiffs in establishing the transport of chemicals from the tannery to the wells, there was no competent evidence that Beatrice disposed of the complaint chemicals at either the tannery site or on the 15-acre parcel. *Anderson* v. *Beatrice Foods Co.*, ___ F. Supp. ___ (D. Mass. 1989). Thus, the initial presumption notwithstanding:

> Concealment of the Report . . . did not constitute substantial interference with the preparation of a tannery case, where the essential predicate of such a case — use and disposal of the complaint chemicals by the defendant — was significantly negated by the evidence developed by the plaintiffs themselves in the course of pretrial investigation and discovery, and has never been otherwise established.

Id. at ___. The district court recommended that its earlier denial of the Rule 60(b)(3) motion be sustained. We ordered supplementary briefing, entertained oral argument, and now accept the lower court's recommendations in their entirety.

II

The next leg of the journey can be accomplished with some expedition. Given the amount of time, energy, and resources which this litigation has consumed, and the number of pages heretofore written about it by various judges of various courts, we believe that an effort at (relative) brevity would be both a refreshing change and a decided virtue.

It is crystal clear that the district court read our opinion carefully, followed our instructions closely, and faithfully applied the principles which we elucidated. Although appellants assign error to the recommendations in a plethora of respects, their complaints anent the main issue reduce, essentially, to the thesis that the district court, having found that the Report would have been helpful in establishing the flowage of chemicals from the tannery to the wells, was required to find that nondisclosure worked a substantial interference with the full and fair preparation and presentation of appellants' case. Elaborating on the theme, plaintiffs contend that the

court's finding as to lack of evidence on use and disposal of the chemicals was irrelevant to the claim that defendants violated Fed. R. Civ. P. Rule 60(b)(3). Put another way, plaintiffs argue that the district court went down a blind alley when it concentrated on the insufficiency of the disposal-related information that plaintiffs had thus far acquired. Proof of disposal, they say, was not the issue; rather, the court should have focused exclusively on the effect of the concealment: whether what plaintiffs failed to learn, due to Beatrice's misconduct, could have contributed significantly to preparation and presentation of their case. Although this was indeed the pivotal question, we do not share plaintiffs' steadfast belief that it can — or should — be wrenched out of the case's context.

The clearly erroneous standard governs our review of the finding that defendant's misconduct did not result in substantial interference with the preparation and presentation of plaintiffs' case. This means that:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Anderson v. *City of Bessemer City*, 470 U.S. 564, 573-74 (1985); *see also Keyes* v. *Secretary of the Navy*, 853, F.2d 1016, 1019-20 (1st Cir. 1988). Thus, "where the conclusions of the [trier] depend on its election among conflicting facts or its choice of which competing inferences to draw from undisputed basic facts, appellate courts should defer to such fact-

intensive findings, absent clear error." *Irons* v. *FBI*, 811 F.2d 681, 684 (1st Cir. 1987).

In this case, it was eminently reasonable to posit the strength or weakness of plaintiffs' evidence on disposal as an important factor bearing on the determination of whether nondisclosure amounted to a substantial interference. For the tannery site to be a source of actionable contamination, or for there to be a "nexus" between the tannery and the wells, *Anderson* v. *Cryovac, Inc.*, 862 F.2d at 932, it was incumbent upon plaintiffs first to prove that the tannery used, and disposed of, the complaint chemicals. The dearth of evidence on this point, coupled with the lack of any obvious connection between the Report and sources of knowledge as to tannery operations, seems a good indication that, even armed with the Report, plaintiffs would not have been able to prove the essential elements of a "tannery" case. The district court so found. That finding, whether or not inevitable, was "plausible," that is, satisfactorily rooted in the record and completely consistent with common sense. A contrary finding — that the Report might have led to a more intense search for site-specific evidence, and that somehow, some way, such a search might have struck paydirt — would depend heavily on conjecture and surmise. To argue that the district court could have made these findings is one thing; to argue that the court was duty bound to embrace such speculation, and that its failure so to conclude was clear error, exemplifies a Barmecidal triumph of hope over reason.

Having perused the relevant portions of the record (no mean feat, considering its bulk), we are confident that the lower court's finding of "no substantial interference" derives adequate support from the evidence. That being so, we decline plaintiffs' invitation to substitute our collective judgment for that of the trier. Such an approach would not only make a mockery of "clear error" review, but would ignore the reality

of events. In a long, complicated, factbound case like this one, the trial judge has a unique coign of vantage. Having presided during the seven year history of this case, throughout the discovery and pretrial proceedings, seventy-eight days of trial, three days of posttrial hearings on the Rule 60(b) motion, and at the protracted hearings following remand, he has gained an intimate familiarity with all the pieces of a labyrinthine puzzle and with how those pieces fit together. *See, e.g., Anderson* v. *Cryovac, Inc.*, 862 F.2d at 932 (directing that hearings after remand be held before Judge Skinner because of his "intimate knowledge of the case and [mastery of it] its factual intricacies"). Appellate review of complex, fact-dominated issues cannot be allowed to descend to the level of Monday-morning quarterbacking.

In sum, the court below was correct in viewing its task as more than an exercise in theoretical abstraction and in considering the evidence on disposal. Its findings are sound, well substantiated, and free from observable legal error.[3] Accordingly, we adopt the court's recommendations as to the [non]effect of defendant's deliberate misconduct. It follows that the road to recovery ends here. Plaintiffs' Rule 60(b)(3) motion was properly denied.

III

Plaintiffs also contend that Beatrice should have been sanctioned and/or defaulted for deliberate misconduct amounting to "fraud upon the court." We find plaintiffs' hyperbole unconvincing and discern no reason to reject the district court's

[3] Plaintiffs' allegation that the court failed to conduct a sufficiently thorough and aggressive inquiry can best be described as chimerical. We believe that the record so emphatically refutes the allegation that substantive comment on our part would be supererogatory.

recommended disposition of this aspect of the case. We explain briefly.

The court below acknowledged that "[t]he discovery process is at the heart of federal trial practice," and that "deliberate interference with it is a matter ordinarily deserving of a significant sanction." *Anderson* v. *Beatrice*, ___ F. Supp. at ___. The court found, however, that both sides were guilty of sanctionable conduct: defendant by not disclosing the Report's existence, thereby failing forthrightly to meet its discovery obligations[4] (conduct which the court thought sanctionable under Fed. R. Civ. P. 37); plaintiffs by continued prosecution of the "disposal" claim after investigation and discovery had proven that there was no objective basis in fact for a case which posited defendant's dumping of complaint chemicals either at the tannery site or on the 15-acre parcel (conduct which the court thought sanctionable under Fed. R. Civ. P. 11).[5] In the court's estimation, neither party had clean hands, ergo, neither "should profit through sanctions from the delinquency of the other, and that should be the sanction for both of them." *Id.* at ___.

It is axiomatic that, "[a]bsent abuse of discretion, we will not disturb a district court's choice of sanctions." *Fashion House, Inc.* v. *K mart Corp.*, 892 F.2d 1076, 1081 (1st Cir. 1989). This deferential standard applies to sanctions in the discovery milieu. *See National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (per curiam); *Fashion House*, 892 F.2d at 1081; *Farm Constr. Services, Inc.* v. *Fudge*, 831 F.2d 18, 20 (1st Cir. 1987). It also applies

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[4] In our earlier opinion, we explained why and how Beatrice's actions in this regard constituted an improper failure to make discovery. *Anderson* v. *Cryovac, Inc.*, 862 F.2d at 927-29.

[5] The district court also referred to 28 U.S.C. § 1927. *Anderson* v. *Beatrice*, ___ F. Supp. at ___. But, this reference adds nothing to the mix. Therefore, we discuss the topic of plaintiffs' derelictions solely in terms of Rule 11.

under Rule 11. *See Fudge* v. *Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1022 (1st Cir.), *cert. denied*, 109 S.Ct. 65 (1988); *EBI, Inc.* v. *Gator Indus., Inc.*, 807 F.2d 1, 6 (1st Cir. 1986). Because the imposition of sanctions is peculiarly within the province of the court in which the challenged conduct occurs, a party complaining to an appellate tribunal in respect to trial-level sanctions "bears a heavy burden of demonstrating that the trial judge was clearly not justified in entering [the] order." *Spiller* v. *U.S.V. Laboratories, Inc.*, 842 F.2d 535, 537 (1st Cir. 1988).

The rule is anchored in common sense. "District judges live in the trenches . . . [and] . . . are, by and large, in a far better position than appellate tribunals to determine the presence of misconduct and to prescribe concinnous remedies." *Fashion House*, 892 F.2d at 1082 (reviewing imposition and choice of sanctions for discovery misconduct); *see also Jackvony* v. *RIHT Fin. Corp.*, 873 F.2d 411, 419 (1st Cir. 1989) (decision whether to assess Rule 11 sanctions primarily for trial court, which has "tasted the flavor of the litigation") (quoting *Muthig* v. *Brant Point Nantucket, Inc.*, 838 F.2d 600, 603 (1st Cir. 1988)). As this situation aptly illustrates, decisions as to whether sanctions should be imposed, and if so, what form they should take, often require intensive inquiry into the circumstances surrounding an alleged violation. The trial judge, steeped in the facts and sensitive to the interplay amongst the protagonists, is ideally equipped to review those ramifications and render an informed judgment. *See Kale* v. *Combined Ins. Co.*, 861 F.2d 746, 758 (1st Cir. 1988); *Thomas* v. *Capital Sec. Services, Inc.*, 836 F.2d 866, 873 (5th Cir. 1988). After all, the imposition of sanctions is essentially "a judgment call," *FDIC* v. *Tekfen Constr. and Installation Co.*, 847 F.2d 440, 443 (7th Cir. 1988); and as such, seems best left to the judicial officer most familiar with the case, the parties, and the attorneys. *See Kale*, 861 F.2d at 758; *O'Connell* v. *Champion Int'l*

Corp., 812 F.2d 393, 395 (8th Cir. 1987). Accordingly, we treat the district court's recommendation on sanctions in this case as we would treat a sanctions order, reviewable only for abuse of discretion.

> We have recently restated the test for such review:
>
> Abuse [of discretion] occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them.

Fashion House, 892 F.2d at 1081; *see also Independent Oil and Chemical Workers of Quincy, Inc.* v. *Procter & Gamble Mfg. Co.*, 864 F.2d 927, 929 (1st Cir. 1988). Here, our examination of the papers persuades us that the lower court weighed all proper and no improper factors in dealing with sanctions. Nor can we conclude, in the extraordinary circumstances of this extraordinary litigation, that the court made a "serious mistake" in balancing the scales by imposing somewhat unconventional remedial measures on the derelict parties.

Sanctions come in a wide variety of guises. The trial judge is best positioned to decide what sanction best fits a particular case or best responds to a particular episode or pattern of errant conduct. So long as the sanction selected is "appropriate," Fed. R. Civ. P. 11, the Civil Rules place virtually no limits on judicial creativity.[6] *See, e.g.*, Rule 11, advisory committee's

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[6] We think it noteworthy that Rule 11, while requiring the court to impose "an appropriate sanction" for an infraction of the rule's standard, neither defines nor delimits the types of sanctions that may be "appropriate." Rule 37, which applies generally to a party's failure to make proper discovery, does list some possible sanctions, but the listing is not comprehensive; the rule's operative principle is that the district court "may make such orders in regard to the failure as are just. . . ." Fed. R. Civ. P. 37(d). The elasticity of the Civil Rules is in our view not accidental.

note, 1983 amendments (trial court "retains the necessary flexibility to deal appropriately with violations of the rule. . . . [and] has discretion to tailor sanctions to the particular facts of the case"); Fed. R. Civ. P. 37(d) advisory committee's note, 1970 amendments (acknowledging change in rule's language "to provide the greater flexibility as to sanctions which the cases show is needed"); *see also* G. Joseph, *Sanctions: The Federal Law of Litigation Abuse*, § 16, at 217 (1989); *Cheeck* v. *Doe*, 828 F.2d 395, 397 (7th Cir.), *cert denied*, 484 U.S. 955 (1987); *Donaldson* v. *Clark*, 819 F.2d 1551, 1557 (11th Cir. 1987); *Lieb* v. *Topstone Indus., Inc.*, 788 F.2d 15 1, 157-58 (3d Cir. 1986).

The appropriateness of a particular sanction is primarily a function of two variables: the facts presented and the court's purpose in penalizing the errant party. Sanctions, under both Rules 11 and 37, serve dual purposes of deterrence and compensation. *See, e.g., Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 763 (1980); *National Hockey League*, 422 U.S. at 643; *Brown* v. *Federation of State Medical Bds.*, 830 F.2d 1429, 1437-38 (7th Cir. 1987); *Donaldson*, 819 F.2d at 1556; *Oliveri* v. *Thompson*, 803 F.2d 1265, 1281 (2d Cir. 1986), *cert. denied*, 480 U.S. 918 (1987); *Brockton Sav. Bank* v. *Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 12 (1st Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986); *Westmoreland* v. *CBS, Inc.*, 770 F.2d 1168, 1179 (D.C. Cir. 1985). As a deterrent, sanctions speak largely to systemic concerns. Courts cannot function smoothly if parties, and counsel, ignore the rules, overlook due dates, or flout court orders. In this sense, sanctions may be a useful tool in vindicating the court's authority, reminding those who need reminding of the protocol, and ensuring orderliness in the judicial process. As compensation, sanctions recognize that a litigant's failure to abide court orders and rules, or his disregard of obligations inherent in the conduct of litigation, harm not only the system but the other participants

in the process. Sanctions, then, can have a contrapuntal effect, adjusting the scales so that the extra time, effort, and expense to party "A" which occurs in consequence of the dereliction of party "B" can be repaid in some equitable fashion.

In general, a trial court confronted by sanctionable behavior should consider the purpose to be achieved by a given sanction and then craft a sanction adequate to serve that purpose. *See Thomas*, 836 F.2d at 878; *Brown*, 830 F.2d at 1437; *Cabell* v. *Petty*, 810 F.2d 463, 466 (4th Cir. 1987). While we eschew the imposition of rigid guidelines for the trial courts in this circumstance-specific area of the law, the judge should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms. Whether deterrence or compensation is the goal, the punishment should be reasonably suited to the crime. Nevertheless, whichever purpose is to be served — and often, sanctions are designed to serve some combination of the two prime purposes — the trial court's discretion in fashioningg sanctions is broad. *See National Hockey League*, 427 U.S. at 642; *McLaughlin* v. *Bradlee*, 803 F.2d 1197, 1205 (D.C. Cir. 1986); *Albright* v. *UpJohn Co.*, 788 F.2d 1217, 1222 (6th Cir. 1986); *Brockton Sav. Bank*, 771 F.2d at 10; G. Joseph, *Sanctions, supra*, § 2, at 15.

In this case, the district court determined, supportably in our view, that both sides were guilty of sanctionable conduct. The court estimated that the monetary losses suffered by the respective "victims" was nearly the same, that is to say, Beatrice's Rule 37 misconduct cost plaintiffs about the same, in terms of counsel fees and expenses, as plaintiffs' Rule 11 misconduct cost Beatrice. The court decreed that neither side should be permitted to recoup its losses. That, in itself, was a sanction: Beatrice was sanctioned by declaring forfeit the sum it would have been awarded in consequence of plaintiffs' Rule 11 violation, and vice versa. There is, then, no merit to

plaintiffs' claim that appellee was allowed to go scot-free, without any sanction being imposed for its discovery misconduct.

In our view, by electing in effect to fine each litigant in the amount it stood to gain through the other's violation, the judge adequately addressed the interests of both deterrence and compensation. To be sure, there is a certain inexactitude about the broad assumption that the parties' malefactions were equally culpable and equally costly. But, given the necessarily problematic nature of the inquiry, we cannot say that the court's resort to rough equivalencies represents the sort of "serious mistake," *Fashion House*, 892 F.2d at 1081, necessary to constitute an abuse of discretion. *Compare, e.g., Hazen* v. *Pasley*, 763 F.2d 226, 229 (8th Cir. 1985) (where district court denied discovery sanctions, court of appeals will not reverse absent clear abuse of discretion); *Craig* v. *Far West Eng. Co.*, 265 F.2d 251, 262 (9th Cir.) (district court's discretion not abused by court's refusal to sanction noncompliant party for breach of discovery obligations), *cert. denied*, 361 U.S. 816 (1959).

We are equally unpersuaded by plaintiffs' suggestion that concealment of the Report should have triggered an entry of default. The argument is keyed to the notion that defendant's misconduct constituted fraud on the court. We recently wrote:

> A 'fraud on the court' occurs when it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense.

Aoude v. *Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989).

There was no fraud here. The district court found, explicitly, *see Anderson* v. *Beatrice Foods, Inc.*, 127 F.R.D. at 1 (court "found no evidence of fraud"), and implicitly — its finding of "deliberate misconduct," *id.* at 6, negated a finding of fraud. *See generally* Fed. R. Civ. P. 60(b)(3) (distinguishing among "fraud," "misrepresentation," and "other misconduct"); *Anderson* v. *Cryovac, Inc.*, 862 F.2d at 923 (differentiating between "misconduct" and "fraud"). Although discovery misconduct could, perhaps, sink to the level of fraud on the court, not every instance of such misconduct so qualifies. While we neither condone what transpired in this case nor minimize its gravity, we think that the district court acted within its discretion in determining that defendant's dereliction, albeit sanctionable, did not constitute "gross misbehavior," *Aoude*, 892 F.2d at 1119, of the sort which required, as a matter of law, that the sternest of available sanctions be imposed.[7]

IV

This long safari of a case may at last be brought to a conclusion. We do not believe that the district court's recommendation as to the effect (or, more properly phrased, the lack of effect) of the nondisclosure was clearly erroneous or infiltrated by mistake of law. We have considered each and all of the objections which plaintiffs have raised to the main recommendtion and find them unavailing.[8] Lastly, mindful of the district

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[7] Indeed, we, ourselves, adumbrated the likelihood of some milder sanction. *See Anderson* v. *Cryovac, Inc.*, 862 F.2d at 924 n.11 (if misconduct is sanctionable but its aftermath benign, default or dismissal need not automatically follow; "[t]here is not always a need to ditch the baby with the bath water.").

[8] Several of plaintiffs' objections do not warrant, and have not received, extended comment. It suffices to say that we have considered and rejected them. We have also surveyed the district court's rulings on remand in respect to various motions and evidentiary points which drew plaintiffs' fire in their supplementary brief. We are equally unpersuaded that any of these rulings constituted reversible error.

court's involvement in, and intimate familiarity with, the checkered history and inner workings of this convoluted case, the sanctions recommendation commands our respect.

We need go no further. We accept the suggestions of the district court and, premised thereon, uphold the denial of appellant's Rule 60(b)(3) motion and the court's eschewal of sanctions beyond those inherent in leaving the parties in the beds they had made. The judgment and order appealed from are, therefore,

Affirmed. No costs.

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1070

ANNE ANDERSON, ET AL.,
Plaintiffs, Appellants,

v.

BEATRICE FOODS CO.,
Defendant, Appellee.

Before

Torruella and Selya, *Circuit Judges*,
and Bownes, *Senior Circuit Judge*.

ORDER OF COURT

Entered April 30, 1990

Appellants' petition for rehearing is denied. In the main, the petition rehashes arguments made to, and rejected by, the panel in our earlier opinion, and to that extent requires no comment.

Appellants do add a new wrinkle. They claim that because the district court, acting sua sponte, simultaneously alleged a Rule 11 violation, found that such a violation had occurred, and imposed a sanction without giving appellants notice or opportunity to respond, the district court's actions do not comport with due process. This asseveration is severely flawed.

The district court did not *impose* a sanction; it merely made a recommendation that we do so. *See, e.g.*, Slip Op. at 9 (discussing "the district court's recommended disposition" of the sanctions issue); *Anderson* v. *Cryovac, Inc.*, 862 F.2d 910, 932 (1st Cir. 1988) (remanding for, inter alia, district court's recommendations as to appropriateness of sanctions). Appellants had ample notice of the recommendation, briefed it extensively, and were fully heard before we adopted it. To be sure, our standard of review was deferential, *see* Slip Op. at 12 — but this does not obviate the fact that due process concerns seems to have been amply satisfied.

We need not definitively resolve the point, however, because appellants have forfeited any right to voice it. They did not make the due process claim below. They did not make it in the supplemental briefing before us. They did not make it at oral argument. We have routinely held that (1) a suitor's first obligation, on pain of waiver, is "to seek any relief that might fairly have been thought available in the district court before seeking it on appeal." *Beaulieu* v. *United States Internal Revenue Service*, 865 F.2d 1351, 1352 (1st Cir. 1989); and (2) that an appellant's brief on appeal fixes "the scope of issues appealed" so that an appellant cannot resurrect an omitted claim "merely by referring to it in a reply brief or at oral argument," *Pignons S.A. de Mecanique* v. *Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983). A fortiori, a party cannot be permitted to raise a new issue for the first time on a petition for rehearing in the court of appeals.

The petition for panel rehearing is *denied*.

By the Court:

Clerk.

APPENDIX F.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ANNE ANDERSON, *et al.*,
Plaintiffs

v.

BEATRICE FOODS CO.,
Defendants

DEFENDANT BEATRICE FOODS CO.'S ANSWERS TO POST-TRIAL INTERROGATORIES IN ACCORDANCE WITH DECEMBER 22, 1988 ORDER

Pursuant to the Order of December 22, 1988, Beatrice Foods Co. ("Beatrice") responds to the interrogatories propounded in the plaintiffs' December 14, 1988 Motion for an Order. Unless otherwise indicated, these interrogatories have been responded to on the understanding that an interrogatory inquiring about the knowledge or actions of "Beatrice" (e.g. Nos. 2, 3, 9) seeks the information possessed by Beatrice Foods Co., and an interrogatory inquiring about the knowledge or actions of "Riley" (e.g. Nos. 16, 18, 22) seeks the information possessed by John J. Riley Co.

Interrogatory No. 2.

When, and from whom, did Beatrice obtain any knowledge regarding the 1983 Yankee investigation and/or report?

Answer

Beatrice gained knowledge of the Yankee report and investigation from the report itself when it was first seen by Beatrice's attorneys around the time of the Foley deposition, about

January 9 or 10, 1986. Beatrice further responds that in October 1985, Mr. Frederico, one of its attorneys, was permitted to read a so-called Ch. 21E assessment, now referred to as a GEI report, at the offices of Riley's counsel. The document contained references to work performed by YE²ARS. Mr. Frederico's brief review did not give him knowledge that there had been a separate investigation and report by Yankee which was additional to the technical materials already in the case.

Beatrice also further responds that in early January, 1986 the existence of the report was mentioned by Riley's counsel to Mr. Jacobs and that Riley's counsel had objections to it.

Interrogatory No. 3.

When and from whom did Beatrice obtain possession of the 1983 Yankee report or any documents relating to it or the investigation?

Answer

Beatrice obtained possession of the Yankee report in the fall of 1987 as an attachment to the plaintiffs' motion filed in the Court of Appeals for the First Circuit. The Statement of Jerome P. Facher filed today discusses the events and circum stances surrounding Beatrice's attorneys' first contacts with the report.

Interrogatory No. 4.

When and from whom did Beatrice obtain any knowledge regarding the 1985 GEI investigation and/or report?

Answer

Beatrice's attorneys first learned that the 1985 GEI Report had been written at or about October, 1985 when Mr. Frederico was permitted to read it in Ms. Ryan's office. Beatrice further responds that its attorneys were asked by Riley's counsel in or about October, 1984 for copies of any studies available

from this litigation for Geotechnical Engineering Inc. and Riley's counsel to review.

Interrogatory No. 5.

When and from whom did Beatrice obtain possession of the 1985 GEI report or any document relating to it or the investigation?

Answer

Beatrice obtained possession of the 1985 GEI report when its attorneys received it in the fall of 1987 as an attachment to the plaintiffs' motion for a new trial.

Interrogatory No. 6.

Were the 1983 Yankee or the 1985 GEI reports or any documents relating to the reports or investigations, or any test results or data obtained by the investigations, shown to any of the attorneys, experts, or consultants for Beatrice? If so, what was shown, to whom was it shown, and when was it shown?

Answer

As to consultants or experts for Beatrice, the answer is no. As to attorneys and what was seen or shown, see responses to Interrogatories No. 2, 3, 4, and 5.

Interrogatory No. 9.

Prior or subsequent to notice of the filing of this suit, did Beatrice destroy, secrete, or otherwise make unavailable any documents, property, or information relevant to the subject matter of this litigation? If so, identify the documents, property, or information and indicate the date(s) and circumstances under which the documents, property, or information were destroyed, secreted, or otherwise made unavailable?

Answer

No.

Interrogatory No. 12.

Did Beatrice and/or Riley, during the pendency of this action add, change, alter, or remove any physical structure, soil, or material on or from the Riley property? If so, describe the circumstances of the addition, change, alteration, or removal including the date(s) and person(s) involved and the nature of the addition, change, alteration, or removal and any documents relating thereto.

Answer.

Because of the "and/or" language and the ambiguity as to "Riley property" the interrogatory is answered separately as to Beatrice and Riley.

1. Beatrice responds as follows:

As to Beatrice the answer is No. Beatrice does not interpret this interrogatory as including the activities of Woodward Clyde on the 15 acres. As plaintiffs are aware, Woodward Clyde did various well installations, sampling and other work on the 15 acres which in a sense would have resulted in "physical changes" to the property. In addition, a fence or some part of a fence, was erected on the 15 acres and could be considered as a "physical structure", as could the Woodward Clyde test wells.

2. Answering as to Riley, Beatrice's counsel first responds that this interrogatory is overly broad and could include all of the activities involving normal tannery operations and maintenance, such as delivery, use and storage of hides, use, repair and replacement of machinery and similar matters. Beatrice has not, however, attempted to catalog every physical change that occurred during a four-year period on the approximately thirty acres of a working tannery employing more than 100 employees. In addition, a building was erected in 1987 in the rear of the tannery property and some of the preparatory activities may have occurred before the end of the trial.

Further answering as to Riley, Beatrice's counsel responds, after inquiry of Riley's counsel, that in addition to the work described in the Yankee Report and taking of water and soil samples, Riley's activities which could be said to result in "physical changes," included fencing, continuing to landfill tannery sludge on the tannery site; expanding an area for hide storage; construction of a pre-treatment facility on the tannery site; and grading at the tannery site. Beatrice's counsel is also informed that some soil on the tannery property may have been given away or sold in or about late summer or early fall of 1986, outside the time period of these responses.

Further answering as to Riley, Beatrice's counsel responds that in the course of the present inquiry, Beatrice's counsel and Riley's counsel have now been informed that sometime, probably before the pendency of this lawsuit, corrugated sheet metal, scrap iron and truck parts which were principally on or near the southern border of the 15 acres were sold or given to a scrap dealer. In the course of the present inquiry, Beatrice's and Riley's counsel have also been informed that, in the summer of 1983, in connection with grading and clearing for the installation of test well 3, soil and some brownish foreign material appear to have been graded and removed by tannery employee(s) from the area where well 3 was to be installed and from the site; that the material may have been on Whitney Barrel property just south of the 15 acres; that it did not come from the tannery; that similar material remained in the area and that, other than grading for the well, the condition of the general area around well 3 was not substantially changed. Documents reflecting tests from around this area were in evidence at trial.

In the courts of the present inquiry, Beatrice's and Riley's counsel are now informed that a Mr. Marcus, a former Riley employee, a Mr. Sorenson and possibly the scrap metal dealer are believed to have information about the steel and iron and

that Mr. Sorenson, and possibly a Mr. Granger, a former Riley employee, are believed to have information about the soil and material removal. Mr. Sorenson is also believed to have information about the tannery soil which was sold or given away.

Interrogatory No. 13.

When, by whom and on whose behalf was the Yankee and the GEI investigations initiated, negotiated and ordered?

Answer

As a result of inquiry of Riley's counsel and attending the deposition of Ms. Hanley of GEI, Beatrice's counsel is informed that the Yankee investigation was initiated by Mr. John J. Riley in 1983 after a solicitation by Ms. Margaret Hanley. Beatrice's counsel is further informed that the work of GEI was initiated or ordered by Mr. Riley and by Riley's counsel in the fall of 1984. Beatrice did not initiate, negotiate, or order the Yankee or the GEI reports.

Interrogatory No. 14.

Identify the persons who originated, ordered, negotiated, monitored, and supervised the Yankee and GEI investigations on behalf of Beatrice and/or Riley.

Answer

No one from Beatrice (or on Beatrice's behalf) originated, ordered, negotiated, monitored, or supervised either the Yankee or the GEI investigations. After inquiry of Riley's counsel and attending the depositions of Ms. Hanley in January 1989, Beatrice's counsel is informed that the Yankee investigation was ordered by Mr. John J. Riley, and was supervised by Ms. Margaret Hanley of YE²ARS. The activities of GEI were ordered by Mr. Riley and counsel for Mr. Riley, and were supervised in 1985 by Ms. Margaret Hanley of GEI.

Interrogatory No. 16.

When and from whom did Riley obtain possession of the 1983 Yankee report or any documents relating to it or the investigation?

Answer

After inquiry of Riley's counsel and attending the deposition of Ms. Hanley, Beatrice's counsel is informed that the Yankee Report was forwarded to Mr. John J. Riley by Ms. Hanley on or about November 1983. At the Hanley deposition, documents relating to the Yankee report were produced and marked as Exhibits.

Interrogatory No. 18.

When and from whom did Riley obtain any possession of the 1985 GEI report or any documents relating to it or the investigation?

Answer

After inquiry of Riley's counsel, Beatrice's attorneys are informed that Riley obtained possession of the 1985 GEI Report from GEI. The final report was dated April 19, 1985. Documents reflecting GEI reports, drafts and related documents were produced at the deposition of Ms. Hanley, and marked as Exhibits. Beatrice's attorneys are further informed that drafts of the report were provided Riley on or about the date they bear.

Interrogatory No. 22.

Prior or subsequent to the filing of this suit, did Riley destroy, secrete, or otherwise make unavailable any documents, property, or information relevant to the subject matter of this litigation? If so, identify the documents, property, or information and indicate the date(s) and circumstances under which the documents, property, or information were destroyed, secreted, or otherwise made unavailable?

Answer

After inquiring of Riley's counsel, Beatrice's counsel is informed that the answer is No.

Interrogatory No. 25.

During the pendency of this litigation, if Beatrice at any time made inquiry of Riley regarding responding to plaintiffs' discovery requests or court ordered discovery, describe:

a. the requests or discovery orders inquired about;
b. the nature of the inquiry;
c. the date(s) of the inquiry;
d. the person(s) inquired of;
e. the substance of the information obtained;
f. the nature of any refusal or interference by Riley regarding the inquiry.
g. whether Beatrice has any reason to believe that Riley did not provide full and complete responses to the inquir(ies) and the basis of the belief.

Answer

Because of the complexity of the discovery, the length and volume of discovery requests of all sorts, and the various discovery disputes and controversies that existed in this case and the rulings and resolutions concerning them, Beatrice is unable to respond to this interrogatory in the specificity requested. Accordingly, Beatrice responds as follows:

Beatrice owned the tannery from December, 1978 to January 3, 1983. In responding to the plaintiffs' first and second sets of interrogatories which were filed during Beatrice's period of ownership, Beatrice attorneys inquired of tannery personnel including Mr. John J. Riley.

After January 1983, counsel for Beatrice did not make inquiry of tannery personnel or John J. Riley Co. in connection with discovery requests because Beatrice did not understand that it was appropriate or required. Mr. Riley and John J. Riley

Co. were third parties separately represented by counsel. There was also an agreement and procedure in effect that discovery from the tannery would be handled between the tannery's counsel and plaintiffs' counsel. The plaintiffs' counsel took advantage of that agreement during the course of discovery. In addition, the Asset Purchase Agreement between Beatrice and Riley did not to anyone's understanding create a duty of inquiry of Riley. As to this point, see also Statement of Jerome P. Facher filed today.

Throughout the course of the lawsuit, Beatrice's counsel necessarily had contacts from time to time with Riley's counsel because of the issues involved in the case, the fact that tannery personnel were deponents and later were witnesses, and that fact that the tannery and 15 acres were the subject of extensive investigation.

With respect to the steel, scrap iron and material referred to in Interrogatory 12 above, Beatrice first learned that information in the course of preparing these responses to Post-Trial Interrogatories. Beatrice's counsel is informed by Riley's counsel that John J. Riley had and continues to have no memory of these events.

Respectfully submitted,
Beatrice Foods Co.

By its attorneys,

Jerome P. Facher
Neil Jacobs
Hale and Dorr
60 State Street
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(617) 742-9100

January 26, 1989

APPENDIX G.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ANNE ANDERSON, et al.,
Plaintiffs

v.

BEATRICE FOODS CO.,
Defendants

CIVIL ACTION
NO. 82-1672-S

STATEMENT OF JEROME P. FACHER IN RESPONSE TO COURT ORDER OF DECEMBER 22, 1988

In the December 22, 1988 Order, the Court directed that "Mr. Facher shall state his position concerning the failure of the defendant to disclose the Yankee Report . . ." In compliance with that Order, this statement of my position attempts to describe what occurred and the reasons, circumstances and context in which the events took place.

A capsule summary of my contact with the Yankee Report is this: it was briefly seen by me about the time of the Foley deposition in January 1986 during a period of discovery chaos and disorder; it was John J. Riley Co.'s ("Riley") document not Beatrice's; it came from the possession of Riley's lawyer, Mary Ryan; it was considered to be privileged as work product; it was the subject of Riley's objections to a deposition subpoena, and its production or non-production was a matter between plaintiffs and Ms. Ryan as part of the ground rules under which discovery was being conducted.

My contact was not in a vacuum but in the context of the frantic events of that period and all that preceded it. Although

that context cannot be accurately recreated, an important part of it included the following considerations which affected my conduct and reactions at the time I first saw the Yankee report:

I. *The Ground Rules Between The Parties As to Discovery from the Tannery* — During the course of discovery there was an agreement or working arrangement between the parties that tannery documents and access to the 15 acres or the tannery be obtained, not from Beatrice, but directly from the source of that information, Ms. Ryan who was Riley's counsel. Correspondence, conversations and most importantly, conduct confirm the existence of this practical arrangement.

Although discovery never worked smoothly in this case, this agreement between the parties was part of the ground rules and was in existence in 1985 and 1986. I was aware of its existence and operation in January 1986 just as I was aware that there had been numerous differences of opinion and disputes directly between Ms. Ryan and plaintiffs' counsel about discovery from her clients.

The understanding and agreement that tannery documents, access to the 15 acres and tannery access was to be sought and obtained from Ms. Ryan did not draw artificial legal distinctions or create barriers to discovery. After the sale, Riley was a separate operating company with its own corporate counsel and its own legal and practical concerns. As to some of these, Riley and Beatrice had common interests; on others their interests diverged. Then and now, it was appropriate for Riley to have its own counsel to deal with its corporate and other matters, especially those touching the litigation. The ground rules on which discovery from Riley was based reflected this practical and legal reality, and provided plaintiffs' counsel with the opportunity for full discovery from Riley directly from the source of the information, namely, Riley's counsel.

In the complicated maze of discovery in this case it made sense to have the plaintiffs' counsel deal directly with Ms. Ryan without Beatrice's being an intermediary. Rather than being diverted from the source of the documents, plaintiffs' counsel was directed to it and took full advantage to his benefit. The record shows that during the course of discovery important arrangements such as access to the 15 acres for site inspections, testing, documents to be produced by subpoena, depositions of tannery personnel and other matters were all negotiated and arranged (or disputed) between him and Ms. Ryan.

2. *Lack of Importance of the Asset Purchase Agreement.* — These ground rules and the plaintiffs' use of them are part of the explanation why the Asset Purchase Agreement between Beatrice and Riley had no significance in discovery from the tannery. If plaintiffs' counsel wanted tannery documents it was understood he would seek them from Ms. Ryan, not Beatrice. Consequently, no connection between the Report and the Asset Purchase Agreement ever occurred to me in January 1986. No one had any thought or made any suggestion that Beatrice had the burden of producing Riley documents (particularly any created *after* the sale), or that one section of that Agreement (which would not be interpreted until more than two years later) had any effect whatever on document production or identification.

Although my actions have now been viewed as if in 1986 the Asset Purchase Agreement obligated Beatrice to produce tannery documents for the plaintiffs, I had no such belief or understanding in 1986, and no one, (including the plaintiffs), had ever asserted such an obligation. In fact, not until 1988 did this Court make any ruling that the Asset Purchase Agreement created a duty on Beatrice to inquire of Riley's counsel about tannery documents. This was an entirely new and unexpected interpretation creating an obligation wh[illegible], as a prac-

tical matter, had not existed in anyone's mind in 1986. Indeed, as noted above, the parties' understanding and procedure about tannery documents did not rely in any sense on the Asset Purchase Agreement, but provided plaintiffs' counsel with direct access to Riley's counsel in order to obtain documents.

My reference to this retroactive effect of the 1988 interpretation of the Asset Purchase Agreement is not to re-argue the issue but to point out that, during discovery, no one had pressed for document production based on duties claimed to be imposed by that Agreement. Plaintiffs' counsel, who had received the Agreement during discovery, first advanced this argument in 1987, more than 1½ years after the jury verdict and in the middle of the hearings on the new trial motion. This was characterized by the Court as a "brand new argument" which up to then had not been presented in any form. See Transcript of Hearings, Day 2, page 68.

In the practice of law and particularly among trial lawyers, one has to rely on many agreements, understandings or procedures between counsel, formal and informal. In this instance, the ground rules followed were not unique or illogical. The manner in which the tannery's documents were to be produced was straightforward and consistent with the usual method of obtaining documents from non-parties. This was the procedure on which I relied and which the parties followed. This is one reason why I concluded the Report, though briefly seen, was a tannery document subject to Ms. Ryan's objection, but also subject to the plaintiffs' opportunity to press for production. I had no reason to think the Report was, or — two years in the future — would be considered to be, a document which Beatrice would be responsible for producing.

3. *Claim of Privilege by Riley's Counsel* — Another important part of the overall context and circumstances in January 1986 was Ms. Ryan's claim of work product privilege which appeared to me to be reasonable. I respected that claim, which

could easily have been tested by the plaintiffs to whom the objection was being made that day or the next.

Far from concealment, Ms. Ryan gave the plaintiffs' counsel full opportunity to press for production. The Report was not produced at the Foley deposition on January 10 and the category of the subpoena which covered it was objected to. Later in court, on January 14, 1986, Ms. Ryan voluntarily raised the fact that a dispute might well arise. Plaintiffs' counsel did not press for production but stated that the dispute had been re solved. Certainly in my mind plaintiffs' counsel had chosen to forego his interest in document production in favor of pressing for trial.

Ms. Ryan's objections and the tactical decision of plaintiffs' counsel not to press for production are further indications of the existence and importance of the ground rules as to the tannery's documents and the unimportance of the Asset Purchase Agreement as a means to obtain discovery. In the spotlight of hindsight and with the present benefit of two judicial opinions, this may be incorrect, but neither I nor anyone else thought so then.

4. *Frenzied and Disordered Pace of Discovery.* — My contact with the Yankee Report was a one-time, and not particularly significant, event in an ever expanding universe of discovery carried out under the pressure of discovery deadlines and the imminent prospect of a long, complicated trial. Even those who survived that period can not adequately describe the chaos, disorder and crushing burden of the discovery and the frenzy of other last minute events that were taking place in January 1986.

The Report was first seen by me in the midst of this frantic period as one of thousands of documents in a case inundated with medical, geological, historical, environmental and scientific documents of every kind and description, most of which there was little time to read, let alone understand. In a January

27, 1986 affidavit, I attempted to describe that enormous quantity of materials, the awesome volume of work involved, and the events of that period which was crammed with non-stop depositions, motions, court appearances, discovery disputes, witness interviews, expert identification, fact investigation, trial preparation, conferences, legal research, EPA orders and actions, exhibit marking, document and data organization, scheduling problems and a host of other matters. Above all, there was a ceaseless barrage of paper that threatened to engulf us all. The experience was unlike any I had ever known as a practicing lawyer.

One chaotic part of that experience was plaintiffs' retention, about December, 1985, of a separate Washington law firm which both engaged investigators and embarked on a vast and ambitious deposition schedule concentrating on tannery discovery in the final month before the discovery cutoff. In addition to everything else that was taking place, literally dozens of new depositions were scheduled by the new law firm.

Friday, January 10, 1986, the day of the Foley deposition, was probably typical of the hectic events and pressure which existed. Five depositions had been scheduled for that day. I attended all or part of the depositions of Mr. Foley, Dr. Pinder and Mr. Ferrara. In addition, there were motions to be made or to be argued, future depositions to be attended, documents and transcript flooding in, interrogatories and document requests, an EPA order about fencing the property, factual and legal research of all kinds and a host of other matters, not the least of which was an entirely new set of last minute depositions to be taken or quashed. (Eighteen depositions had been scheduled between January 8 and January 13.) Deposition taking, attending and reading never seemed to end, and eventually as many as fourteen depositions were taken on what was supposed to be the final day of discovery, January 22, 1986. This effort to "bury" the defendants in discovery, while insisting on an

early trial date, did not permit anyone the luxury of extended reflection, especially about a particular document or discovery incident. Of necessity, decisions were made quickly, and not revisited.

Reconstruction of Events Concerning the Yankee Report — Against this backdrop of events and circumstances my contact with the Yankee Report was not particularly memorable. Nonetheless, I have tried to reconstruct what occurred as best I can and as candidly as I can.

My best present recollection is that the Yankee Report was seen by me about January 9 or 10, 1986. I cannot be sure exactly when or where I saw it. My best memory is that I saw it with Ms. Ryan. Wherever it was, I knew that it was a Riley document, that Ms. Ryan was asserting a work product privilege, and that she had so objected to a subpoena, and would object at the deposition of Mr. Foley.

I did not review the Report carefully or view it as my document to produce. I had no concern about the Report and reached no conclusions about its merits or implications, if any. The only conclusion I quickly reached was that it was Riley's document not Beatrice's, that as such, it was covered by the ground rules on production that the parties had been following for a year or more, that I had no reason to doubt Ms. Ryan's claim of work product privilege, and that it was an objection she would continue to make at the deposition.

I formed no intent about the Report and made no reasoned or reflective "judgments." There was no thought about suppression or concealment. The Report simply was not an important document or an important event. To me it was another tedious, technical looking report in an ever growing mountain of materials in a case rapidly becoming unmanageable.

To reach my conclusions took about the same amount of time it would take to skim a document shown to counsel in court for the purpose of objecting. The exercise was no different

from those which trial lawyers make every day in dealing with documents making objections, or responding to inquiries from the court or counsel. To the extent I considered it at the time, I would say I was making a lawyer's routine decision about the classification of a document.

I attended the Foley deposition (and two others) on January 10, 1986. I noted that Ms. Ryan had objected in writing to the part of the subpoena calling for production of documents such as the Yankee report and stated objections at the start of the deposition. I also was present in court on January 14th. This was an additional opportunity for the plaintiffs to dispute Ms. Ryan's objections and press for production. Much had occurred that day including our motion to suppress numerous depositions and our attempts to deal with literally dozens of surprise witnesses sprung on us at the 11th hour. During the hearing Ms. Ryan advised the court and counsel of the fact that a motion to compel might be filed. In his effort to retain the trial date, plaintiffs' counsel stated that the matter concerning Ms. Ryan's anticipated motion to compel had been "resolved." I believed that plaintiffs' counsel (or his Washington counterpart) had been apprised of Ms. Ryan's objections and that they had decided not to press for production. I did not think of these events again until November 1987 when we were responding to the allegations of the new trial motion.

Even with today's hindsight, I believe that any inquiry by me of Ms. Ryan would not have yielded a different sequence of events. Riley's written objection still would have been made and disclosed to the Court and, I am convinced, the plaintiffs still would not have pressed for production because of their perceived tactical advantages in insisting on trial.

The circumstances and context in which I first saw the Report and my initial reaction to it also help explain why there was little thought given to supplementing interrogatories. In the incredible pressure of preparing this case for the trial date,

the concept of supplementing interrogatories was something to which one was not able to devote much time or attention. Faced with the circumstances I have described, time was insufficient to reflect on the supplementation of previously filed responses, especially where discovery had already exceeded any I had ever known, and was still going on at a maniacal pace. Simply dealing with or reacting to the pressure of events was a never ending, always frustrating and exhausting job. In addition, although I cannot be certain, the proceedings of the January 14, 1986 hearing likely created the perception that any issues about the objected-to documents had been resolved in open court and did not require further attention.

More importantly, the interpretation by which the Report ultimately has been held to be Beatrice's responsibility did not then exist, nor had it been asserted. As I have stated, no one had suggested in 1986 (or before November 1987) that the language of the Asset Purchase Agreement imposed upon Beatrice the burden of producing tannery documents especially those which had been prepared for Riley *after* the sale of the tannery to Riley, and which were claimed to be work product. I now doubt that it would have then occurred to me to supplement our responses with a document of this kind belonging to a non-party, especially since our own interrogatory responses had always contained a work product objection.

Since reading the Court of Appeals' decision in December 1988, and this Court's later order on the parameters of the upcoming inquiry, I have spent many hours in preparing this statement and have tried to reconstruct the events of January 1986. I regret that I do not have perfect recall. These events involving the Yankee Report were simply not that memorable or important and the document was of no particular consequence. Even with hindsight, I do not think otherwise.

To be sure, I have now learned, by virtue of the teaching of this Court and the Court of Appeals that I appear to have

failed to comprehend the true legal effect of paragraph 32 of the Asset Purchase Agreement. Nonetheless, as part of my response to this Court's Order, I wish to express my personal belief that labelling my actions "misconduct," as that term is commonly understood, is inappropriate. I believe I engaged in no misconduct and I can say without equivocation that none of my actions or conduct was intended or designed to suppress or conceal the Yankee Report or to deal with it unfairly, improperly or in bad faith.

I can also say that the Yankee Report was not a document that would have concerned me in the defense of Beatrice's case, and I would not have viewed it as harmful to Beatrice.

My conduct at the time, however, was not guided by any judgment whether the Report was helpful or harmful to either party or whether I should or should not have produced it. My conclusion was based on the considerations I have here tried to recount and stemmed from the good faith conduct of an advocate in a hard fought piece of litigation.

Statement as to Other Matters — In response to the Court's direction, I also state that I am not aware of any documents that have been concealed, suppressed or improperly withheld in the course of discovery directed to Beatrice nor was there any "conspiracy" to do so. I am also not aware of the improper removal of any relevant evidence from the 15 acres nor was there any "conspiracy" to do so. As a result of discharging my obligations in response to this Court's Order of December 22, 1988, I have obtained the information contained in the Answers to Post-Trial Interrogatories and in the Statements of Supplementation to Previous Interrogatories, and these documents are being filed with this Statement.

Further Considerations Affecting This Statement — I believe that this Court, having closely observed the course of the discovery and trial proceedings in this case, and having observed my conduct in the trial of this and other cases and in

other matters over a decade or more, is in a position to form a judgment about the manner in which I conduct myself as a trial lawyer. In the career that I have followed over the last 37 years as a government lawyer, private practitioner and law school teacher, I trust that I have left some markers against which my character can be judged. Because these proceedings may come to the attention of others who do not have the information, I have attached as Exhibit A a resume setting out the course of my career.

I also trust that this Court and other courts and tribunals before whom I have appeared, as well as lawyers with and against whom I have tried cases, know that I try cases according to the Rules, and that I do not resort to misconduct or impropriety to win. I am distressed, and in no small measure indignant, that losing counsel now makes such allegations in his efforts to overturn a verdict fairly won.

Respectfully submitted,

_____

Jerome P. Facher

Dated: January 26, 1989

JEROME PAUL FACHER

I. PERSONAL

Date of Birth: December 9, 1925
Place of Birth: Wilkes-Barre, Pennsylvania
Home: 34 Hamilton Road (Unit 505)
Arlington, Massachusetts 02174

II. EDUCATION

Primary: Wilkes-Barre City School System
High School: Meyers High School, Wilkes-Barre, Pennsylvania
Colleges: (1) Bucknell Junior College (now Wilkes College), Wilkes-Barre, Pennsylvania
(2) Pennsylvania State University, University Park, Pennsylvania
Law School: Harvard Law School, Cambridge, Massachusetts 1948-1951

III. DEGREES AND HONORS

Bachelor of Arts – Journalism – 1946
Pennsylvania State University
Graduated With Honors
Member, numerous honorary scholastic societies

Bachelor of Laws— Harvard Law School – 1951
Graduated Magna Cum Laude
Editor, Officer, Harvard Law Review
1949-50, 1950-51

IV. MILITARY EXPERIENCE

Enlisted as Private, United States Army, September 1946
Service in Korea with U.S. Army Combat Engineers (13th Regimental Combat Battalion), January 1947-March 1948; Discharged as Staff Sergeant, March 1948
Commendation from Division Engineer, 7th Infantry Division

V. POSITIONS HELD

September 1951 to February 1953
Assistant to Department Counsellor,
Office of the Secretary of the Army,
The Pentagon, Washington, D.C.

February 1953 to October 1954
Assistant to, and then Chief, United States Delegate to the Infrastructure Committee, and to the Payments & Progress Committee of the North Atlantic Treaty Organization (NATO), Paris, France.

February 1955 to December 1959
Attorney at Law – associated with the law firm of Mintz, Levin & Cohn, 50 Federal Street, Boston, Massachusetts

1959 to Present
Associate (1959-1962); Junior Partner (1962-1965) and Senior Partner (1965 to Present) in the firm of Hale and Dorr, 60 State Street, Boston, Massachusetts specializing exclusively in trial of cases before the State and Federal Courts in Massachusetts and other states.
Chairman of Litigation Department – 1977 to 1988

VI. ACADEMIC APPOINTMENTS

Member of Faculty, Lecturer at Law on Trial Practice 1961 to present, Harvard Law School.
Lecturer, Evidence, 1972, Harvard Law School,
Former Faculty Member, Trial Practice, Northeastern University Law School (1971)
Academic Visitor, New College, Oxford University (Trinity Term 1987)

VII. PUBLICATIONS AND LECTURES

Author, "Process and Pleadings" – Mass. Law Quarterly, June 1963.

Author, "Supreme Judicial Court Rule 15 – Landmark in Massachusetts Procedure," Mass. Law Quarterly, 1966

Author, "Deposition Tactics and Practice," Mass. Law Quarterly, 1967, reprinted in The Litigation Manual (ABA 1983)

Former Contributing Editor, Mass. Law Quarterly

Lecturer, New England Law Institute

Former Guest Lecturer on Massachusetts Procedure, Boston University Law School

Lecturer, "Rule 15 and the General Practitioner," 1966.

Directed and served as Trial Judge and Moderator in 11-week course for Massachusetts Lawyers on "Trial Tactics, Techniques and Selected Problems of Evidence in Massachusetts Courts, September-December 1969.

Conducted day-long series of lectures for Massachusetts lawyers on "Discovery in Massachusetts" Sept., Dec. 1971.

Faculty Member, National Institute of Trial Advocacy, Boulder, Colorado, 1973, 1974.

Moderator, "Practice Under The New Federal Rules of Evidence", Judicial Conference of the First Circuit, May 1975.

Lecturer, 12th Annual Skills Course, MCLE, "Winning Through Effective Case Preparation," 1976, 1977, 1978, 1979.

Lawyer/Faculty Member, Trial Advocacy Workshop, Harvard Law School, 1977 to Present.

Lecturer, Judicial Conference of the First Circuit, 1981.

Author, Rule 11 Survey for First Circuit contained in "Sanctions Rule 11 and Other Powers" (ABA 1986 1st Edition)

Planning Committee, Damages Seminar, Flaschner Judicial Institute, 1988-89.

VIII. ADMISSIONS TO BAR AND BAR ASSOCIATIONS

Member, Massachusetts Bar Association.

Member of Bar of State and Federal Courts of Massachusetts.

Member of Bar of District of Columbia and Court of Appeals for the District of Columbia.

Member of Bar of the Court of Claims.

Member of Bar of the Tax Court.

Member of Bar of the Supreme Court of the United States.

IX. OTHER PROFESSIONAL ACTIVITIES

Fellow, American College of Trial Lawyers.

Vice Chairman, Judicial Nominating Commission, Commonwealth of Massachusetts (1978); Member of Commission (1977-1979).

Member, Supreme Judicial Court Advisory Committee (On Civil Rules).

Chairman, First Circuit Panel of the U.S. Circuit Judge Nominating Commission (1980).

Member, Flaschner Judicial Institute Academic Committee.

Special Counsel (appointed by Supreme Judicial Court) to Commission on Judicial Conduct, 1979, for investigation, inquiry and evidentiary hearing concerning Massachusetts District Court Judge.

Special Counsel (appointed by Supreme Judicial Court) to Commission on Judicial Conduct, 1987-88, for investigation, inquiry and evidentiary hearing concerning Massachusetts District Court Judge.

APPENDIX H.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ANNE ANDERSON, *et al.*,
Plaintiffs

v. C.A. No. 82-1672-S

BEATRICE FOODS CO.,
Defendants

WRITTEN STATEMENT OF ATTORNEY MARY K. RYAN OBTAINED PURSUANT TO COURT ORDER OF DECEMBER 22, 1988

Pursuant to the Order dated December 22, 1988, Beatrice Foods Co. has obtained the following statement from Attorney Mary K. Ryan in response to each of the questions the Court directed be put to her:

Question 1. When did she receive the Yankee Report?

I first received the Yankee Report in early 1985 when I began working on this litigation. The Report was in our files because Nutter, McClennen & Fish had received it, most likely in 1984, from Mr. Riley sometime after he had received it from Ms. Hanley.

Question 2. What did she do with it?

I believe that I reviewed the report shortly after my involvement with the case began, and, after reading it, returned it to our file. I believe I reviewed the report again when I prepared objections to the subpoena duces tecum directed to the John J. Riley Company, Inc. ("Riley Company"), in January 1986. At that time, I made the determination to assert the objections discussed in my answer to question 9 below.

Question 3. When did she first show it to Attorney Facher?

I do not presently have a memory of having shown the report to Mr. Facher, although I believe I permitted Mr. Facher or Mr. Jacobs to see it shortly before the subpoena objections were served. I have some recollection of discussing the objections with Mr. Facher at the plaintiffs' counsel's office before the commencement of the Foley deposition and it is possible that Mr. Facher saw the document there.

Question 4. What was her reason, if any, for not disclosing it to Attorney Facher as soon as it was produced?

I did not disclose the report to Mr. Facher prior to January 1986 because I did not consider there to be any reason to disclose it to him. It never crossed my mind to produce the report to Mr. Facher because I considered it to be my client's expert work product.

At all times prior to trial I considered the Yankee Report to be a Riley document, as to which Nutter, McClennen & Fish had the sole authority to decide whether to assert any applicable privilege. This understanding was consistent with the understanding of the parties to the litigation that plaintiffs should seek documents in the possession of the Riley Company directly from the Riley Company. Even had I known in 1986 that the Asset Purchase Agreement would be construed in the manner it was later construed in 1988, the Riley Company would not have conceded that Beatrice could control the production or non-production of a privileged report, especially one which had never been a Beatrice document, had been generated by a consultant to Riley Company *after* the sale of the tannery back to Riley Company, and had been paid for by Riley Company.

Question 5. Did she order the study by Yankee?

No.

Question 6. If so, for what reason?

Not applicable.

Question 7. Was the study ordered at the suggestion of some other person?

Yes.

Question 8. If so, who?

John J. Riley, Jr. as president of the Riley Company ordered the report for the reasons discussed below.

Question 9. What was her basis for objecting to the production of the Yankee Report at the deposition of Foley and removing it from the file?

After the deposition subpoena was received, I prepared a written response which set forth general and specific objections to certain of the definitions and instructions used in the subpoena and to specific requests, including paragraph number 3, the paragraph which is asserted to have called for the Yankee Report. I made the following objections for the following reasons:

1. Work Product Objection. Mr. Riley requested that the Yankee Report be prepared to confirm his strong belief that there was no basis for any contention that the tannery had contributed to the contamination of any public water supplies. The *Anderson* lawsuit was then pending. Although neither Mr. Riley nor Riley Company were parties to the litigation, Mr. Riley was aware of the possibility that Riley Company might be added as a party in this case (as, indeed, was attempted but abandoned in 1985), and that the EPA was conducting an investigation in various areas of the Aberjona River Valley.

As of January, 1986, when the response to the deposition subpoena was prepared, the report had been maintained in confidence by Riley Company and by Nutter,

McClennen & Fish. To my knowledge, it had never been disclosed to any person outside of Riley Company and my law firm. To my knowledge there were only two copies of the report (other than the author's copy), one of which was maintained by me at Nutter, McClennen & Fish, and one kept by Mr. Riley. I did not believe that any disclosure of the report to Beatrice's counsel would affect the privilege. Accordingly, I asserted a work product privilege in my written response to the subpoena.

2. Relevancy Objection. I understand that the plaintiffs have asserted that the Yankee Report relates to the 15 acres. That is incorrect. I understood then, and it continues to be my understanding, that the report relates solely to the tannery property. In the objections I filed to the subpoena, I stated that Riley objected to producing documents regarding the tannery, as opposed to the 15 acres. That objection was based in part on the fact that the subpoena was served at the very close of the discovery process and, as I understood the discovery that had occurred up until that time, the case against Beatrice had focused exclusively on the 15 acres. My understanding was bolstered by the fact that in June 1985, plaintiffs' counsel had asked to inspect the tannery and I had told them that Riley would not permit the inspection of the tannery, but would permit an inspection of the 15 acres. That position had not been challenged when the objections were being prepared.

3. General Objections. In addition to the objections specifically made to paragraph 3, the Riley Company also made general objections which were incorporated by reference into paragraph 3. Those objections included:

a. an objection to producing any document created before 1964 or after 1979 (the Yankee Report was prepared in 1983); and

b. materials relating to tests other than tests for the particular chemicals on which the plaintiffs based their claims.

All of the objections I raised were raised in good faith, were written and filed with the court, and none of them were challenged by plaintiffs. At the deposition, plaintiffs' counsel acknowledged that he understood the Company's response was subject to its objections. Since the objections were filed the same day as the deposition, I agreed that the plaintiffs could have ten days to move to challenge our objections. I alerted the Court that I expected that there might be a discovery dispute about my objections in the January 14, 1986 hearing. Plaintiffs' counsel not only did not challenge any objections to or limitations on production imposed by my objections, but affirmatively advised the Court that they had been "resolved."

Mary K. Ryan
Nutter, McClennen & Fish
One International Place
Boston, MA 02110
617/439-2000

Respectfully submitted,

Jerome P. Facher
Neil Jacobs
Hale and Dorr
60 State Street
Boston, MA 02109
617/742-9100

Dated: January 26, 1989

APPENDIX I.
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ANNE ANDERSON, et al.,
Plaintiffs

v.

BEATRICE FOODS CO.,
Defendants

CIVIL ACTION
No. 82-1672-S

FURTHER WRITTEN STATEMENT OF ATTORNEY MARY K. RYAN

March 17, 1989

The following statement is submitted in lieu of oral testimony to address issues which have been raised during hearings conducted in this inquiry, and supplements my statement of January 26, 1989 submitted by Mr. Facher.

I. THE FOLEY DEPOSITION

General Procedures. In December 1985, plaintiffs made their first and only request to the tannery to produce documents for this litigation by serving deposition notices and subpoenas duces tecum on the John J. Riley Company, Inc. and the Riley Leather Company, addressed to the "custodian of the records" or someone designated by the companies to testify about "record-keeping procedures."

I represented the Riley companies in responding to these subpoenas and at the deposition. In doing so, ,I followed my usual procedures, consistent with what I believe to be proper

practice. The steps taken were as follows. Assisted by an associate from our firm, I went to the tannery to meet in persons with Messrs. John Riley and Edward Foley in order to review each of the requests, to determine what documents might exist and what was covered and not covered by the requests, to evaluate what documents, if requested, were properly subject to objection, and to evaluate any objections that I planned to make. My decisions regarding production of documents and the objections filed with the Court were based on my own professional judgments, reached after discussion with our clients about the subpoenaed documents.

The next step in responding to the subpoenas was assembling documents to be produced, which were gathered from various sources — Mr. Riley, the tannery (through Mr. Foley), and the files of Nutter, McClennen & Fish ("NM&F"). These documents were produced at the Foley deposition, held on January 10. In a few instances, based on agreements with plaintiffs' attorneys reached during or after the deposition concerning discovery disputes which surfaced during the deposition, further documents were produced after that date.

Mr. Edward Foley was chosen to respond to the deposition. That was my decision, after consultation with our clients. There was no employee at the tannery who held the title "recordkeeper," but Mr. Foley was the employee most familiar with recordkeeping procedures. As office manager, I considered him to be the closest anyone at the tannery came to being the "recordkeeper," and the individual most familiar with the tannery's recordkeeping procedures.

Objection to Producing the Yankee and GEI Reports. In interpreting the subpoenas, I believed that these documents were included only in paragraph 3 of the documents requested. I objected to producing these reports for several reasons: work product privilege, relevance, and overbreadth, as well as the

general objections made to producing documents other than those involving the complaint chemicals or to producing any documents outside the time periods of the operation of Wells G & H (1964-1979).

The basis for asserting a work product privilege objection with respect to the Yankee Report was my understanding that the report had been prepared at the request of Mr. Riley, for himself and for the John J. Riley Company, Inc., and that Mr. Riley's request for the report was made in anticipation of the possibility of litigation involving him or the company or possible EPA administrative proceedings. In assessing the work product nature of this report before objecting to its production in this litigation, I relied upon conversations with our clients, the broad allegations of Riley wrongdoing that had been made (since closure of the City wells), of which Mr. Riley was well aware, my own understanding of the pending litigation as of 1983, my evaluation of the potential for other claims which might be asserted (by private parties or by the EPA), and the confidence in which the report had been held.

With respect to the GEI report several additional factors led me to conclude that a work product privilege should be asserted. First, NM&F had been involved in requesting such work from these consultants prior to the production of any GEI draft and indeed, was directing the request for expert assistance with very specific considerations in mind. From NM&F's viewpoint, GEI was asked to draft a report in order to provide us, as Riley's lawyers, with information to assist this firm in advising Riley how best to protect his and his company's interests with respect to potential litigation, consistent with the business and real estate objectives which Riley also wanted us to evaluate — namely, the possibility for sale or lease of tannery property. Since in 1984-1985 an environmental opinion was customarily required in real estate transactions, as Riley's lawyers we needed to know what type of so-

called 21E report an outside expert could provide. At no time during GEI's work was Riley or Riley Company committed to proceeding with a real estate transaction regardless of potential litigation consequences. When this work was undertaken, it is my understanding that neither NM&F nor the tannery had reason to believe that any findings or conclusions by GEI would be anything but favorable, based on the information then known. However, that did not obviate, in our mind, the necessity of assessing the situation first from a potential litigation perspective. We proceeded, therefore, with the process having very much in mind that the principal interest to be protected was any potential litigation or administrative proceedings which might conceivably involve Riley interests including, of course, but by no means restricted to this litigation.

A second factor which caused me to conclude that this report was privileged was the contents of the GEI draft itself, which, as I viewed (and view) it, were based on the Yankee report itself. The principal author was the same, the underlying data was the same, and the findings and conclusions are an outgrowth of the work done by Yankee in 1983.

A final factor I considered was my belief in 1986, based largely on my training as an environmental lawyer, that a 21E report necessarily involved evaluation of potential liability and possible legal obligations under the Massachusetts Oil and Hazardous Material Release Prevention and Response Act. In general terms, whenever an expert is retained to do such a report, that consultant is examining, from a technical viewpoint, potential legal obligations and liabilities under Massachusetts environmental law, which the Commonwealth enforces through both administrative proceedings and court actions. I understand that the custom and practice among the environmental bar is that attorneys are, as a rule, intimately involved in the process of undertaking and preparing 21E evalu-

ations. It is my view, and that of many environmental lawyers, that reports of this nature prepared under an attorney's direction, and at his or her request, are attorney work product unless and until they are disclosed to a government agency. Viewed from this perspective, treating a 21E report which is not required to be disclosed to the Massachusetts Department of Environmental Quality Engineering as privileged work product is consistent with cases holding that an internal corporate investigation or audit of potential liability in anticipation of litigation constitutes protected work product.

I also considered it relevant that the tannery parcel was included within the geographical boundaries of EPA's Wells G & H Superfund site; any information or report produced by GEI might be potentially relevant to the EPA administrative proceedings, in which our clients conceivably faced liability as of January 1986. As events turned out, EPA did wish to obtain a copy of the report.

I certainly believed it appropriate, indeed I felt I had an ethical obligation to our clients, to assert the work product privilege in these circumstances.

My reasoning in asserting the work product privilege with respect to Yankee and GEI is not summarized here with the intent to offer argument as to whether that privilege should protect these documents under the law as this Court might find it, but merely to explain what led to my conclusion that it was appropriate and necessary to assert the privilege in January 1986 and to summarize briefly legal arguments I would have presented had the objection been challenged. I could not then have predicted with certainty, of course, how the Court might rule on these objections, assuming they had been timely challenged. However, I did (and do) believe that the reports fall squarely within parameters covered by that privilege.

These objections were not raised because of anything that any attorney for Beatrice said or did not say but because of

my own professional judgment and sense of ethical obligation to our clients to assert proper objections in good faith to discovery directed to the Riley companies.

Analytical Tests Done For The Tannery By Cambridge Analytical Associates On Soil, Sludge And Water Samples. In January 1986, I was aware of the analytical tests of soil, sludge and water samples conducted by the tannery which were produced to the plaintiffs as part of Beatrice's submission in January 1989. There are several reasons why these tests were not produced in response to the Riley recordkeeper subpoenas. First, based on an interpretation of the requests taken as a whole, I made a very early decision that the subpoenas did not fairly call for the production of chemical analyses of soil, sludge or groundwater done by the tannery. Only paragraph 25 of the subpoena specified test reports, and it referred specifically and exclusively to reports by the Skinner & Sherman analytical laboratories, although I knew then that the plaintiffs were aware that Cambridge Analytical Associates ("CAA") had done chemical analyses of samples for the tannery after 1983.

Had I thought that test reports were fairly called for under the subpoenas, I would have evaluated whether a work product privilege properly applied to any such tests, as I understood that most of them were prepared by the Riley Company in anticipation of potential litigation.

Moreover, I objected generally to producing "documents which plaintiffs already have. . . ." A number of the test reports submitted to the Court in January 1989 by Beatrice were already in plaintiffs' possession by the time of this subpoena because they had been submitted to the MDC. These include the CAA report of September 19, 1983 (plaintiffs' exhibit 46) and the CAA report of November 4, 1983 (plaintiffs' exhibits 48 and 49), both of which were filed with the Court in April 1985 as part of plaintiffs' submission on "John

J. Riley, Representations as to Solvent Use." (In addition, the CAA report of January 31, 1984 (plaintiffs' exhibit 51) was attached to the first MDC discharge monitoring report dated February 1, 1984, produced at the Foley deposition on January 10, 1986 — see plaintiffs' exhibit 72.) Finally, the April 1983 CAA report of sludge samples on the tannery was a public record, submitted to DEQE in 1983.

Another point with respect to test reports later submitted as part of Beatrice's January 1989 submission: those that did not relate to the complaint chemicals or related only to tannery property (not the 15 acres) would not have been produced, regardless of the wording of the subpoena request, given the relevancy objections filed in response to the subpoena.

Documents Associated with Skinner & Sherman Reports/Mr. Jones' Notes. The only documents associated with the Skinner & Sherman reports not produced at the Foley deposition are Mr. Jones' notes associated with the June 1982 report. The copies of the Skinner & Sherman reports brought to the Foley deposition on January 10, 1986 were produced in the form in which I received them. To the best of my recollection, I either received these reports from Mr. Riley in January 1986 or already had one or more of them in our files. I had no reason to believe there were any notes associated with the June 1982 report, as it appeared complete on its face, and I therefore had no reason to search for additional copies of the report which might exist. The first time that I became aware of any notes by Mr. Jones pertaining to the June 1982 Skinner & Sherman report was in January 1989, when, in connection with the request by Mr. Facher to provide information within the scope of the Court's order of December 22, and because of the impending closure of the tannery on December 31, 1988, I took custody of Mr. Jones' test files and first learned that these notes were in his files.

With respect to any other notes by Mr. Jones concerning the Yankee report or analytical tests done by CAA, these pertain to documents which were objected to for the reasons discussed above, and such notes would not have been provided even had I known of them.

SCS Report. When I took custody of Mr. Jones' test files in January 1989, I also became aware of the SCS documents for the first time. In light of the objections filed with the Court in response to the subpoena concerning the relevancy of tannery discovery at the late stage of pre-trial proceedings, the SCS documents would not have been produced, as they came under those objections, nor did they pertain to the complaint chemicals.

Tanners' Council of America Test Report. I did not learn of the existence of this document until January 1989, apparently because it was misfiled, that is, not included with the other test reports. However, had I known of it in 1986, I would not have produced this report because it fell within the objection to producing documents relating to chemicals other than the complaint chemicals.

Formulas. In January 1986, neither my clients nor I interpreted the subpoenas to request formulas used by the tannery in various stages of leather-making in the beam house, tan room, finishing room and coloring room. During his deposition, Mr. Foley testified that there were tannery files containing formulas which had not been searched. At the deposition, a dispute over whether the tannery should conduct a search of these files was discussed. I made it clear to plaintiffs' counsel that, under the circumstances disclosed at the deposition — that there were voluminous files which most likely were not responsive to the request — we objected to the oral request at the deposition to search the large number of file cabinets described by Mr. Foley which might contain formulas. The issue was not finally resolved during the deposition.

Following the deposition I continued to discuss with plaintiffs' counsel our disagreements over the proper scope of plaintiffs' discovery. For example, the question of the production of employee rosters was resolved prior to the hearing on January 14. Other negotiations concerned the production of the Beatrice-Riley purchase and sale documents, Moran invoices (the company for which the tannery produced military leather), and a particular customer contract.

I considered the objected to request for a search of the finishing room and laboratory files, or any other such files, to have been resolved either as a result of the statements of plaintiffs' counsel during the January 14, 1986 hearing or because it had not been pursued by plaintiffs after their subsequent discovery negotiations with me. I never agreed to undertake such a search.

If my objection to this search had been challenged in court and if I had been ordered to conduct a search for formulas I would, of course, have consulted Mr. Riley concerning this request and I have no reason to believe that the formulas from his home files, which were provided to me in January 1989 in connection with this inquiry, would not have been located.

No deposition or trial subpoena requesting such formulas was served on Mr. Riley, the tannery, or any of its employees.

II. *RILEY AND BEATRICE VIEWED AS SEPARATE.*

Throughout the course of this litigation I represented clients who were not parties to the litigation and who were, as I viewed it, wholly independent of Beatrice. The basic principle on which I operated was my fiduciary duty to our clients. That and that alone guided professional judgments made in the conduct of the litigation. While I believed Riley had significant common interests with Beatrice vis-a-vis the litigation, I did not view the interests of the two entities as co-extensive. When

I cooperated with Beatrice, I did so based on my view as a litigator as to our clients' best interests. At no time did we conspire with attorneys for Beatrice to conceal or withhold the Yankee Report, the GEI Report, or any other documents or discovery.

III. *WORKING RELATIONSHIP WITH PLAINTIFFS' COUNSEL.*

My contacts with plaintiffs' counsel began when discovery was first directed to the tannery in 1985, some three years after the commencement of the litigation. I dealt principally with Mr. Jan. Schlichtmann and at various times also with Messrs. Conway, Lenzner, Geronemus and perhaps others. I also had dealings with Mr. Gordon, one of plaintffs' consultants, and with expert consultants from Weston Geophysical, including Messrs. Dobrinski and Imse.

Mr. Schlichtmann and I dealt with arrangements for the depositions of Mr. Riley, and Messrs. Foley, Kaine, Jones, Sheehan and Hawley (the five owners of Riley Leather) in 1985. The subpoenas for production of documents from the tannery discussed above were served in late December 1985. I was also requested and agreed to accept service of trial subpoenas for Mr. Riley and Mr. Foley, as I have also been requested and have agreed to accept numerous subpoenas throughout this inquiry.

Many of my dealings with plaintiffs' counsel concerned the plaintiffs' request for inspection of the 15 acres, which was agreed to on certain terms negotiated between Mr. Schlichtmann and myself. I was also in frequent communication with Mr. Schlichtmann and others working for the plaintiffs concerning their investigation on the 15 acres. With respect to all of these matters, plaintiffs' attorneys contacted me directly as counsel for the Riley interests. Some matters between us were

amicably resolved, some were resolved with difficulty, but throughout, my responses to Mr. Schlichtmann and the other attorneys representing plaintiffs were made in the role of counsel for a third party, not as counsel to a defendant in litigation. I acted independently of Beatrice in responding to such matters, in accordance with how I perceived our clients interests. I would have been surprised if any other procedure had been followed or if Beatrice had attempted to assert a right to control any discovery from my clients or to require me to permit an inspection of the 15 acres or the tannery. Indeed, I would have strenuously objected to any such position.

IV. *REMOVAL OF WASTE MATERIAL FROM THE 15 ACRES*

I first learned of evidence of removal from the 15 acres during the course of this inquiry in January 1989 and am not aware of any evidence on that subject that is not before the Court.

Respectfully submitted,

Mary K. Ryan
Nutter, McClennen & Fish
One International Place
Boston, MA 02110-2699
(617) 439-2000

APPENDIX J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Anne Anderson, et al.,
Plaintiffs,

v.

BEATRICE FOODS CO.,
Defendant.

Civil Action
No. 82-1672-S
BBO # 183800
BBO # 104630

AFFIDAVIT OF ROBERT A. FISHMAN

ROBERT A. FISHMAN, being first duly sworn, hereby deposes and says:

1. I am a partner of the law firm of Nutter, McClennen & Fish, One International Place, Boston, Massachusetts. I submit this Affidavit in conjunction with the Affidavit of Mary K. Ryan being simultaneously filed herewith.

2. I have practiced primarily in the real estate and environmental areas. Between 1983 and early 1985, I handled various environmental matters for Mr. John J. Riley, Jr., and the John J. Riley Company, Inc. ("Riley Company"). During the course of this representation, I communicated with defendant's counsel Neil Jacobs of Hale and Dorr on various occasions.

3. On October 2, 1984, I informed Mr. Jacobs of the fact that Geotechnical Engineers, Inc. ("GEI") had been asked to review the environmental reports which had been performed to date, both for Mr. Riley and others, concerning the main tannery parcel and the 15 acres. Thereafter, I also had conversations with Mr. Jacobs regarding possible additional testing by GEI. I had understood from earlier conversations with Mr. Jacobs in connection with the 1983 Woodward Clyde investi-

gation of the 15 acres that, because of the ongoing federal court litigation, the defendant did not want Mr. Riley himself to test the 15 acres without consulting the defendant or its attorneys.

4. During a conversation on November 15, 1984, Mr. Jacobs and I discussed the specific elements that GEI would be testing for on the main tannery parcel, which at the time I understood to include chlorinated volatile organics (including trichlorethylene). Mr. Jacobs also indicated that Beatrice wanted to review in advance any additional testing to be done by GEI for Riley.

5. During another conversation on November 20, 1984, Mr. Jacobs stated in substance that he had intended to discuss the issues raised by the possibility of such additional testing with the defendant's New Jersey environmental counsel Michael Rodburg, but had not yet done so. Mr. Jacobs suggested that I call Mr. Rodburg.

6. I then called Mr. Rodburg on November 20, 1984. During our conversation, we discussed the general background of the case. In substance, he said that as of that date, plaintiffs' allegations had been limited to unauthorized disposal on the 15 acres, and that there had been a firm distinction between the tannery and the 15 acres. Mr. Rodburg informed me that he was concerned about generating test data that potentially could be subject to discovery in the ongoing federal litigation, and that he did not want Mr. Riley drilling any new wells on the tannery property. I informed Mr. Rodburg of the fact that Yankee previously had dug monitoring wells on the main tannery parcel and had performed tests, the results of which were reported to the Riley Company; Mr. Rodburg responded that he was not aware of the Yankee wells and never had seen the Yankee test data.

7. On November 28, 1984, Mr. Jacobs called me and informed me that he had spoken with both Mr. Rodburg and one of the defendant's corporate counsel. Mr. Jacobs described

the litigation generally, informing me that the main tannery was not involved in the litigation and that in connection with the recent motion to amend their complaint, plaintiffs had clarified that their lawsuit still continued to apply only to the 15 acres. During my conversation with Mr. Jacobs, he told me that he had not previously known about the testing by Yankee, that such testing had been done without the defendant's prior authorization, and that he did not want to know the results of that testing. Mr. Jacobs further informed me that it was the defendant's position that Mr. Riley would be on his own with respect to the indemnification agreement between Riley Company and the defendant in the event that he performed any testing upon the main tannery parcel, the main tannery parcel became involved in this litigation, and the testing was subject to discovery in the litigation process. Mr. Jacobs additionally informed me that if Mr. Riley generated information that was harmful to the defendant's case, then the defendant would look to Mr. Riley's company for some dilution of the indemnification agreement. This position was reiterated in subsequent conversations.

8. At no time did I either send copies of the Yankee or GEI reports to any attorney for the defendant or discuss the specifics of the reports with any attorney for the defendant.

9. Nutter, McClennen & Fish expressed its disagreement to defendant's attorneys, in January 1985 and perhaps at other times as well, regarding their interpretation of the indemnification agreement.

/s/ _____

Robert A. Fishman

APPENDIX K.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Anne Anderson, et al.,
Plaintiff,

v.

BEATRICE FOODS CO.,
Defendant.

Civil Action
No. 82-1672-S
BBO # 183800
BBO # 104630

AFFIDAVIT OF ATTORNEY MARY K. RYAN

MARY K. RYAN, being first duly sworn, hereby deposes and says:

1. I am a partner of the law firm of Nutter, McClennen & Fish, One International Place, Boston, Massachusetts. The purpose of this affidavit is to present material in support of my Motion For Reconsideration Of Finding Of Deliberate Misconduct And In Opposition To Recommendation Of Sanctions and in particular, to provide additional information relevant to the circumstances surrounding the Foley deposition in January 1986 and to communications about the Yankee and GEI reports between attorneys at Nutter, McClennen & Fish and defendant's counsel at Hale and Dorr.

2. I graduated from Boston College Law School in 1977 and was admitted to the Massachusetts bar in December 1977. From September 1977 to August 1979, I was employed by the Massachusetts Superior Court, first as a Law Clerk and then as the Chief Law Clerk. Between September 1979 and August 1980, I served as law clerk to the Honorable Ruth I. Abrams, Associate Justice of the Supreme Judicial Court of Massachusetts.

3. In September 1980, I became associated with Nutter, McClennen & Fish as a member of the Litigation Department and became a partner in January 1987. I am presently Manager of the firm's Environmental Practice Group.

4. Since I began practice in 1980, I have been active in many state and local bar associations and bar committees. Most recently, I was appointed as a member of the Gender Bias Study Committee of the Massachusetts Supreme Judicial Court and served as Co-Chair of its Gender and Economics Subcommittee from 1987 to 1989. I was President of the Women's Bar Association of Massachusetts from 1984 to 1985 and a member of its Board of Directors between 1982 and 1986. I served as a member of the Boston College Law School Alumni Council from 1985 to 1989. I am also a member of the Boston Bar Association and the Massachusetts Bar Association and have been active in various committees of those organizations.

5. Between early 1985 and July 1989, I represented Mr. John J. Riley, Jr., the John J. Riley Company, Inc. ("Riley Company"), and, at various times, the Riley Leather Company ("Riley Leather") in connection with the above-captioned litigation. I represented our clients zealously, consistent with my understanding of the Rules of Civil Procedure, ethical proscriptions and accepted custom and practice. I did not knowingly engaged in any misconduct at any time.

6. Plaintiffs served the Riley Company and Riley Leather with subpoenas *duces tecum* on December 24, 1985. Apart from the basic procedures I followed with our clients in preparing their response to plaintiffs' subpoenas, I had several conversations with Hale and Dorr partner Neil Jacobs concerning the subpoenas in January 1986. At the time I received the subpoenas, I was in frequent contact with him concerning matters related to this case which involved our clients. During the course of a telephone conversation with Mr. Jacobs on the

morning of January 2, 1986, I mentioned that I would be meeting at the tannery that afternoon with our clients to go over the subpoenas. I invited Mr. Jacobs to attend the meeting and he agreed to come.

7. I attended the January 2 meeting at the Riley tannery with my associate, Attorney Martin C. Pentz, Mr. Riley, and Mr. Edward Foley. Other tannery employees may have been in attendance from time to time. Mr. Jacobs was also present.

8. At one point during the January 2, 1986 tannery meeting, Mr. Jacobs and I discussed among ourselves Request No. 3, the particular request that encompassed the Yankee and GEI reports. I did not have the reports with me, but at the time I understood Mr. Jacobs to be generally familiar with the work done by Yankee and GEI for Riley, as it had been the subject of previous discussions between Nutter, McClennen & Fish and Hale and Dorr, as discussed further below and in the Affidavit of Robert A. Fishman. I alerted Mr. Jacobs to the fact that I was considering potentially applicable objections to the production of the Yankee and GEI reports. We discussed relevancy objections and Mr. Jacobs' reaction was that it was relatively unlikely that relevance objections to production of the two documents would be sustained. I believe I also discussed work product privilege objections. I left the meeting with the impression that Mr. Jacobs had no strong view, one way or the other, on the issue of whether the Riley Company should assert privilege objections to the production of the GEI and Yankee reports. However, in view of a number of circumstances — the earlier conversations described below, the casual nature of my conversation with Mr. Jacobs on January 2, the fact that Mr. Jacobs had not personally seen the GEI report and that no Hale and Dorr attorney had seen the Yankee report, my lack of familiarity with the case on an overall basis, the Riley Company's indemnity agreement with Beatrice, and the significance of the work product privilege objection — it

seemed appropriate to let Mr. Jacobs see the reports and confirm his position before I made a final decision on the Riley Company response to Request No. 3.

9. After the January 2, 1986 tannery meeting, Mr. Pentz and I prepared draft sets of written objections to both of the plaintiffs' subpoenas pursuant to Fed. R. Civ. P. 45(d). I informed Mr. Jacobs that since objections to the subpoena were due on January 10 under new Fed. R. Civ. P. 6, I planned to serve objections on that date, at the same time as the companies produced documents.

10. The drafts of the Rule 45(d) objections did not contain a specific work product objection to Request No. 3. This is because, based in part upon my January 2, 1986 conversation at the tannery with Mr. Jacobs, I was considering waiving work product and relevance objections and producing the Yankee and GEI reports. I decided to send the Yankee and GEI reports and the draft objections to Mr. Jacobs, among other reasons, to alert him to the fact I was considering waiver. However, I had not made a final determination to waive objections applicable to producing the reports even in the event that Mr. Jacobs reviewed them and concurred in their release, as I always had considered both reports to be privileged work product and therefore properly subject to a work product objection.

11. To my knowledge, no attorney from Hale and Dorr had seen the Yankee report as of early January 1986, although Hale and Dorr Attorney Donald R. Frederico had reviewed the GEI report at our firm's offices in October 1985. On January 9 or 10, 1986, I had the Yankee report delivered to Hale and Dorr, to the attention of Attorney Deborah Fawcett, for Mr. Jacobs to review, along with the draft objection. (I believe I also sent a copy of the GEI report in the same package.) My best recollection is that I sent the Yankee report to Hale and Dorr by messenger on the morning of January 10,

but it could have been delivered during the late afternoon of January 9.

12. Subsequent to my delivery of the Yankee report to Hale and Dorr, I had a telephone conversation with Ms. Fawcett in which she stated, in substance, that the Yankee report should be reviewed by Mr. Jacobs.

13. Shortly after my conversation with Ms. Fawcett, I spoke on the telephone with Mr. Jacobs. Mr. Jacobs informed me that he had reviewed the Yankee report and then stated, in substance, that he agreed with my assertion of the work product privilege objection. Mr. Jacobs also commented on the substance of the report with words to the effect that some of the report's language had been poorly chosen.

14. Consistent with the understanding of the parties during pre-trial discovery that plaintiffs would seek documents in possession of the Riley Company from me as counsel to Riley, I believed in January 1986 that Nutter, McClennen & Fish had the sole authority to decide whether to assert any applicable privileges. After my conversation with Mr. Jacobs, I continued to consider whether to assert objections to the production of the Yankee and GEI reports. I concluded that I would interpose all appropriate objections, including a specific work product objection, to Request No. 3. While I took Mr. Jacobs' position into account, my final decision to assert objections was not based on what Mr. Jacobs said or did not say, but rather, on my own professional judgment based on my view as to our clients' best interests. Mr. Riley and the Riley Company relied upon my judgment in this matter.

15. Mr. Foley was designated as the deponent in response to both subpoenas. Mr. Foley was than an officer and employee of Riley Leather and had formerly been employed by Riley Company. I met with Mr. Foley immediately before his January 10, 1986 deposition for a final preparation session. Either at my office or while accompanying Mr. Foley to the offices of

plaintiffs' counsel, I mentioned the existence of the Yankee and GEI reports to him. I told Mr. Foley, in substance, that there were two reports, namely, Yankee and GEI, that were the subject of legal objections, and that were not being produced. I expected him to testify to that at his deposition if he were asked an appropriate question.

16. I do not recall bringing either the Yankee or the GEI reports with me to the offices of plaintiffs' counsel on January 10, 1986. Bringing objected-to documents to a deposition would have been contrary to my usual practice.

17. Upon my arrival at the deposition, I had a brief opportunity to speak to Hale and Dorr partner Jerome Facher. I discussed with him the fact that there were two reports that I was intending not to produce.

18. I have followed the practice, which I believed to be correct and consistent with what I always have understood to be the custom in Boston, of not specifically identifying documents withheld on the grounds of privilege or work product, at least in an initial response to a discovery request. Indeed, in my response to the Riley Company deposition subpoena, I asserted a written objection to an "instruction" in the subpoena that I identify documents withheld on the basis of privilege to the opposing party. I also asserted a specific work product objection in response to Request No. 3. Furthermore, I put on the record, at the outset of the deposition, an express reminder to plaintiffs' counsel that objections had been made, and on two occasions later in the deposition specifically noted that discovery was being given to him "subject to" the objections that I had interposed.

19. During the course of Mr. Foley's deposition, I did not attempt to prevent him from identifying documents that he had personally seen but that were being withheld on relevance grounds. In addition, I identified certain categories of irrelevant documents that had not been produced. I did not identify any

documents that had been withheld on the grounds of any privilege, and at no point was I asked by plaintiffs' counsel to do so. I never intended to mislead plaintiffs' counsel, either during or after the deposition, into believing that all withheld documents, including documents withheld on the grounds of privilege, had been identified.

20. With regard to Mr. Foley's answer "No" to the question of whether he had "located or identified" any documents responsive to Request No. 3 in the Riley Company deposition subpoena, at no point did I consider Mr. Foley's testimony to be untruthful, because I have no knowledge that Mr. Foley, personally, ever "located or identified" the Yankee or the GEI reports prior to the deposition and because of a conversation I had with Mr. Foley at a recess at the deposition.

21. After hearing Mr. Foley's "No" answer to the question regarding his location or identification of documents responsive to Request No. 3, I decided to review that testimony with him at a recess. At that time, I said to Mr. Foley words to the effect of, "What about the studies," and received as a response words along the lines of, "Mary, I don't know anything about them." It was my impression then, and remains my impression today, that Mr. Foley in fact had no personal knowledge of the two reports and did not believe himself to be able to testify about them. Accordingly, I conducted a cross-examination of Mr. Foley to establish that he did not have personal knowledge of what geophysical reports are (see page 97 of the Foley deposition transcript). I *never* had any intention of purposefully concealing the two reports. Indeed, I conducted this cross-examination specifically to alert plaintiffs' counsel to the fact that Mr. Foley did not have personal knowledge of "geophysical reports."

22. I spoke with Mr. Facher during a recess of the Foley deposition about Mr. Foley's testimony with respect to Request No. 3 and the Yankee and GEI reports. Mr. Facher stated in

substance that I should not be concerned about the question and answer sequence. However, as Mr. Facher only recently had become involved in the case on a day-to-day basis (at least from my vantage point) and in view of my prior conversations with Mr. Jacobs about the reports, I believed that it would be useful to speak also with Mr. Jacobs.

23. I called Mr. Jacobs, again during a recess in Mr. Foley's deposition, from the reception area in the offices of plaintiffs' counsel. I reviewed with him the sequence of Mr. Foley's direct- and cross-examination on the subject of Request No. 3 and the Yankee and GEI reports. Mr. Jacobs responded, in substance, that he saw no problem with what had occurred.

24. Following Mr. Foley's deposition, I engaged in an extensive series of negotiations with plaintiffs' counsel, principally Attorney David Geronemus of Rogovin, Huge & Lenzner, regarding the production of documents and the objections which had been asserted. Even after the January 14, 1986 hearing, in which plaintiffs' counsel Jan R. Schlictmann informed the Court that the plaintiffs' discovery dispute with Riley Company had been "resolved," Mr. Geronemus took the position with me that there were still unresolved discovery disputes. At no time during these negotiations did any attorney for the plaintiffs ask me whether documents were being withheld on the grounds of privilege. I also at no time during these post-deposition negotiations identified *any* documents being withheld on the grounds of privilege.

25. I kept the defendant's attorneys at Hale and Dorr apprised of the course of my post-deposition negotiations with plaintiffs' counsel, including the fact that I advised Messrs. Facher and Jacobs that the plaintiffs had indicated no intention of moving to compel production of the geophysical reports requested in paragraph 3.

26. It was my belief in January 1986 that given my work product objection to the Riley Company subpoena and my

repeated references to written objections during the course of the deposition, I had satisfied the Riley Company's discovery obligation and my obligations as an attorney. I did not believe that I had an affirmative obligation to volunteer information about privileged documents that were being withheld pursuant to a validly asserted objection. Indeed, I thought I might have a duty to my client *not* to disclose such information. Rather, I believed at the time that it was the plaintiffs' obligation to test the specific work product objection to Request No. 3 by a motion to compel production or identification of withheld privileged documents or at the very least to inquire specifically as to why I had made the objection and what documents were being withheld pursuant to the objection. No such motion or inquiry was ever made.

27. As mentioned above, one of the reasons I discussed plaintiffs' discovery requests with Mr. Jacobs in January 1986 was because of prior communications between Nutter, McClennen & Fish and Hale and Dorr concerning Yankee and GEI. I first began work on this matter in early 1985. Prior to that time, my partner Robert Fishman handled various aspects of the Riley Company's environmental matters. When I became involved in this case, it was my general understanding, based principally on communications from Mr. Fishman, that Beatrice had been advised, through Mr. Jacobs, that Mr. Riley had hired GEI to do a 21E report and that GEI had initially recommended conducting more testing on the tannery property. I understood that Mr. Jacobs had advised Mr. Fishman that if Mr. Riley tested on the main tannery parcel and discovered information of an adverse character, Beatrice would view that action as non-cooperation under the indemnity and might not honor the indemnity in whole or in part. Nutter, McClennen & Fish believed that this position was unreasonable under the circumstances; our position was communicated to Hale and Dorr.

28. In October 1985, when I permitted Hale and Dorr Attorney Donald Frederico to come to my office to review the GEI report, this was the first time an attorney from Hale and Dorr had seen the report, although at some point prior to October 1985, I discussed the existence of the GEI report in communications with attorneys from Hale and Dorr.

29. In the spring of 1985 the substance of these communications concerned the existence of the GEI report, the fact that Mr. Riley was considering waiving the work product privilege and releasing the GEI report in connection with efforts to obtain title insurance for a ground lease of a portion of the tannery property, and my request that an attorney from Hale and Dorr review the report and consent to its release. Mr. Jacobs advised me he would not read the report. On another occasion, Mr. Frederico advised me that while Hale and Dorr was not pleased over the prospective release of the report, they acknowledged that they had no control over whether or not Mr. Riley decided to release it.

30. During September and October 1985, I informed Mr. Jacobs and Mr. Frederico that Mr. David Delaney of the Environmental Protection Agency ("EPA") had made an informal request for production of the GEI report. As a result, Mr. Frederico came to my office to review the report in October 1985.

31. Mr. Frederico and I subsequently communicated about a potential change in the way detection limits were indicated in the GEI report. In addition, Mr. Frederico informed me, in effect, that Hale and Dorr concurrred with the dissemination of the GEI report to the EPA.

/s/ _____

Mary K. Ryan, BBO #435860

COMMONWEALTH OF MASSACHUSETTS

County of Suffolk, ss. October 11, 1989

Then appeared before me the above-subscribed Mary K. Ryan and made oath that she had read the foregoing Affidavit and that the statements therein are true to the best of her knowledge.

Before me,

/s/ _____
Notary Public
My Commission Expires: October 8, 1993

COMMONWEALTH OF MASSACHUSETTS

I hereby certify that a true copy of the above document was served upon the attorney of record for each party by hand on October 11, 1989.

_____
Pierce O. Cray, BBO #104630

APPENDIX L.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Anne Anderson, et al.,
Plaintiffs

v.

BEATRICE FOODS CO.,
Defendants

Civil Action
No. 82-1672-S

AFFIDAVIT OF JEROME P. FACHER

1. My name is Jerome P. Facher, and I am lead counsel for the defendant Beatrice Foods Co. in this action. I make this affidavit in opposition to the plaintiffs' motion to disqualify Hale and Dorr.

2. Previously in these proceedings, I have filed a personal statement as requested by the Court, I have obtained Ms. Ryan's statement in response to certain questions posed by the Court, I have provided written answers to certain post-trial interrogatories, I have participated in the supplementation of prior interrogatories, and I have testified at length at the hearing and have made myself fully available for examination and cross-examination on any subject matter relating to the hearing. In addition, I have carried out other duties as requested or imposed by the Court to the best of my ability.

3. My written statement and my testimony have already set out my recollection of my first contact with the Yankee Report. It was, and continues to be, my recollection that I first saw the report in the frenzied period of discovery at or about the time of the deposition of Mr. Foley when it was shown to me

by Ms. Ryan. As I stated at the time of the new trial hearing in 1987, the report was not in the possession of Beatrice or Hale and Dorr.

4. My prior statements and testimony have also addressed my presence at the Foley deposition at which Ms. Ryan represented Mr. Foley. As I generally indicated in my testimony, the deposition was routine and uninteresting, and was characterized by the customary wrangling of counsel. I took no part in Mr. Foley's deposition, asked no questions, and was not particularly engrossed in the proceedings in view of the tremendous press of other matters and the pressures of the upcoming dozens of other depositions and the future trial.

5. As I have testified, as far as I was concerned, the Yankee Report, which I had seen on that day was not a particularly significant document. I considered it to be Riley's document and that it was Ms. Ryan's decision whether to produce it or assert her work product objections. I considered her competent and qualified to make that decision. She appeared to me to be a knowledgeable, independent, and aggressive lawyer who forcefully represented her client and who did not shrink from a hard call. She did not appear to be intimidated by plaintiffs' counsel, whether it was Mr. Schlichtmann, Mr. Lenzner or Mr. Geronemus. She was fully capable of direct confrontation with them, and where appropriate, of requiring resolution of any controversies by the court. As some examples of this, I recall her ejecting Mr. Schlichtmann from the 15 acres because of a violation of an agreement, and her strenuous objections to the tactics of Mr. Schlichtmann's investigators. She was and is, in my view, an advocate who fought hard and fairly on behalf of her client.

6. Ms. Ryan's decisions as to what to do or what to ask at the deposition of Mr. Foley were her own. I did not advise or instruct her. Whether she made some remark or inquiry to me at a recess in the deposition about how the deposition was

going, I cannot truly say. Such remarks or comments are not uncommon; however, I was not consulted in any advisory or supervisory capacity about her questioning or about Mr. Foley's responses. I must also add that I did not consider that she had done anything improper or had misled the two counsel for the plaintiffs. She had made her objections known in advance in writing and she continued to invite motions to compel and further negotiations even at the end of the deposition.

7. Ms. Ryan's question to Mr. Foley about his knowledge of geophysical studies was her own, and based on what she knew about Mr. Foley's knowledge and awareness of the Reports and the accuracy of his responses to the questions at the deposition. As I haved said, it did not strike me as misleading or improper and it would be reasonable to conclude that it was posed for the purpose of clearing up some part of Mr. Foley's earlier testimony. However, unlike Ms. Ryan, I did not know what Mr. Foley had seen, done or been told in preparation for his deposition nor did I know the content of conversations Ms. Ryan may have had with him both before and during the deposition or at the recess.

8. As I have previously said, nothing in the deposition or questioning struck me as particularly startling, and the deposition ended, as it began, with the lawyers arguing about documents. As for Ms. Ryan's calling Mr. Jacobs during a recess in the deposition, I have no memory of that occurring, although it would have struck me as somewhat odd to inquire of him about events at a deposition which he was not attending.

9. As I testified at the March 1989 hearing, there were further contacts between Ms. Ryan and plaintiffs' counsel on the subject of documents. I was not a party to these negotiations but I was aware generally that various agreements were reached as to which further tannery records would be and were produced. As I have also already testified, I knew that the report had not been produced by Ms. Ryan. I also knew that the plain-

tiff had been given until January 17, 1986 to make a motion to compel. My understanding at the time was that any dispute over documents had been resolved in light of the now familiar comment by Mr. Schlichtmann that an expected motion to compel had been "resolved." As I have testified, all of these events occurred in the context of the frantic activities taking place seven days a week and the mammoth quantities of documents constantly piling up in the case in preparation for trial.

10. I have read the affidavits of Mr. Jacobs and Mr. Rodburg with respect to their reactions to uncoordinated experimentation or testing being carried out by non-parties or by lawyers who are not in charge of the presentation or defense of a case. It is not a new or remarkable philosophy that where scientific or technical matters are concerned, neither plaintiff's nor defendant's counsel are in favor of uncoordinated unilateral experiments or test to be carried out by third persons for their own purposes whether those experiments or tests involve land, property, products or people.

11. Finally, on the issue of Beatrice's choice of its own counsel in this case, I have spoken with Karl Becker, Esq., general counsel of Beatrice Foods Co. to whom we report. He is familiar with the fact that the plaintiffs have made numerous accusations against Hale and Dorr and have made previous attempts at disqualification. He has authorized me to state that he desires to have Hale and Dorr continue its representation of Beatrice Foods Co. and objects to the plaintiffs' repeated attempts to deprive Beatrice of the counsel who have participated in this case for more than seven years and who are most familiar with the facts, the law and the complex proceedings to date.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THE 2ND DAY OF NOVEMBER, 1989.

_____

Jerome P. Facher

APPENDIX M.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Anne Anderson, et al.,
Plaintiffs

v.

Civil Action
No. 82-1672-S

BEATRICE FOODS CO.,
Defendant

AFFIDAVIT OF NEIL JACOBS

1. My name is Neil Jacobs. I am a partner in the firm of Hale and Dorr, having graduated from Harvard College in 1973, and the Harvard Law School in 1976. I make this affidavit in opposition to the plaintiffs' motion to disqualify.

2. At the March 1989 hearings I testified at length and was cross-examined about participation in the discovery and pretrial preparation in this case including the events relating to Yankee and GEI reports.

3. At the March, 1989 hearings I testified about my best memory of having discussed with Ms. Ryan in January, 1986 the Yankee and GEI reports. I testified that she discussed the two reports with me, that I was aware that she was considering not producing them and that we discussed the basis for her objections.

4. In view of the unusual circumstances of this case and the exaggerated importance now assigned to the events of January 1986, I have spent considerable time reviewing in my own mind when I first saw the Yankee and GEI reports. Having gone through that process (as well as having testified at the

March 1989 hearing) my best memory remains, as I testified, that I first saw the Yankee or GEI reports at the time of the new trial motion. As I explained in my March 1989 testimony, the reports and their contents were not familiar to me. In particular, the fact that there had been wells installed on the tannery without Beatrice's knowledge was entirely new to me. Had I seen or read the reports in January 1986 I believe that I would have been aware of this fact.

5. In her October 1989 affidavit Ms. Ryan's memory apparently is that she caused the Yankee report and perhaps the GEI report (she is not sure) to be sent to an associate at Hale and Dorr on the morning (or afternoon preceding) of the Foley deposition. I do not recall those documents being received by me or by an associate, nor of having any discussions with an associate about them. Since the time of the new trial motion in 1987, the voluminous documents that are a part of the mammoth volume of materials produced in discovery and pretrial preparation have been searched by me and others and we did not find either report, or any reference to their having been sent to Hale and Dorr.

6. I also have spoken with the other attorneys at Hale and Dorr who were involved in document handling and production, including Ms. Fawcett, the associate to whom Ms. Ryan says she sent the reports. None of them has any recollection of seeing the Yankee or GEI report. In addition, I am aware of Mr. Facher's memory, statements and testimony that he first saw the Yankee report at the time of the Foley deposition when Ms. Ryan showed it to him. I am also now aware of various statements made by Ms. Ryan indicating the confidential nature of the report and the confidence in which it was kept at Nutter, McClennen. In addition, I am also now aware of Mr. Riley's testimony as to the secrecy or confidentiality he imposed when he commissioned the Yankee report and as to his strong feelings that it was none of Beatrice's business.

7. As to the GEI report, I have already testified to my memory that Hale and Dorr was given an opportunity in October 1985 to look at it because, as I understood it, the report was going to be released to the EPA. In these circumstances I asked Mr. Frederico to go to Nutter McClennen's office to read it. At no time was it sent over to Hale and Dorr. Mr. Frederico briefly read it at the Nutter office and reported in substance that it was favorable to Beatrice. As Ms. Ryan's affidavit reflects, neither Mr. Frederico or anyone else from Hale and Dorr tried to prevent Ms. Ryan from providing the report to the EPA and, in fact, as Ms. Ryan states it, Hale and Dorr "concurred" in its release to the EPA.

8. Ms. Ryan's October affidavit states that she recalls a conversation with me in the spring of 1985 requesting that Hale and Dorr "consent" to the release of the GEI report to a title insurance company, and that I would not read the report. I do not recall such a conversation. However, had Ms. Ryan asked me to review a report to her client in order to consent to its release, I would not have done so. As I have indicated in my previous testimony, after the sale Riley and Beatrice were separate companies, and Riley and his companies were represented both at the sale and after by Nutter, McClellen. As I also indicated in my testimony, the production of tannery documents was — at least as we then perceived it — to be carried out by tannery counsel, and the tannery was always treated by us as being responsible for its own information and documents. The plaintiffs' counsel had been so advised and had proceeded on that basis. The issues of privilege, work product or other objections to document discovery were matters to be resolved by the tannery and its counsel. Any decision whether to release documents prepared for the tannery or its counsel following the sale back to Mr. Riley was not a process in which I believed I should participate, or would have participated.

9. As to a specific telephone call to me which Ms. Ryan now believes occurred during a recess at the Foley deposition, I have no such recall, although it seems to me somewhat unlikely in view of Mr. Facher's presence at the deposition.

10. With respect to any conversation with Messrs. Fishman and Rodburg as referred to in Mr. Fishman's October 1989 affidavit, my memory is that in October of 1984, Mr. Fishman only informed me that an engineering firm had been retained by Riley and that Mr. Fishman asked for copies of studies available from the litigation for that engineering firm and him to review. Sometime after that request, Mr. Fishman called me and told me that the engineering firm was considering doing testing on the tannery property. Because I was not an "environmental lawyer" and generally unfamiliar with what is now called "environmental litigation," I suggested that Mr. Fishman call Mr. Rodburg who was Beatrice's environmental counsel and responsible for the testing being performed by Beatrice's expert, Woodward & Clyde. I doubt that my conversation with Mr. Fishman lasted more than a few minutes.

11. I later spoke by telephone with Mr. Rodburg, who had talked with Mr. Fishman. Mr. Rodburg told me in substance that he had told Mr. Fishman that he did not think it was a good idea to have Mr. Riley engage other experts to do uncoordinated and unsupervised testing that was not a part of the defense of either the EPA proceeding or the litigation. Mr. Rodburg and I also discussed the fact that Riley's proposed unilateral testing for his own purposes could affect Riley's indemnity. Mr. Rodburg did not say anything about being told about any Yankee investigation or about any test wells on the property. I do not believe he had been told of these matters by Mr. Fishman.

12. A few days later I had another brief telephone conversation with Mr. Fishman and reviewed what Mr. Rodburg and I had discussed. I described to him the status of the litigation

and told him that testing of the tannery was not regarded as necessary to the defense. I also told him that if Mr. Riley embarked upon his own testing program he should be aware that such action might affect Beatrice's view about Riley's being indemnified. That did not strike me as a novel or unreasonable position. Mr. Fishman told me he thought the two issues were entirely unrelated and did not agree with me. I left it with him that no matter what my views were, I expected Mr. Riley would make his own decisions and would do whatever he thought was in his own best interests. I have no memory of discussing testing by Yankee with Mr. Fishman in 1984 nor did Mr. Rodburg tell me about Yankee testing. I also do not recall saying to Mr. Fishman that I did not want to know the results of Yankee testing. My best memory is that my conversations with Fishman and Rodburg concerned possible future testing and the other matters I have described above.

13. I never stated, suggested, or implied to anyone that the production of the Yankee or GEI reports was anything but a decision to be made by counsel for the tannery, and never sought to influence Ms. Ryan's judgment in that regard. There was no "pressure" on her about production or non-production of the Yankee report or on Mr. Fishman about whether there should be testing done for Riley under Mr. Fishman's direction. There was never any discussion about what effect or non-effect the Asset Purchase Agreement had on the parties discovery obligations nor was this considered by me. I assume Mr. Fishman was aware of all the relevant facts about what Mr. Riley knew, what Mr. Riley had done and what he intended to do. As Mr. Riley's counsel, I believe Mr. Fishman made his own decisions and determinations of what he thought was in his client's best interests. As Beatrice's counsel, I also had an obligation to do the same for Beatrice. That there may have been differences of viewpoints and interests between Riley and Beatrice and between their counsel, or differences over

any legal or practical consequences of various actions should not be wholly unexpected.

SIGNED AND SWORN TO UNDER THE PAINS AND PENALTIES OF PERJURY.

Neil Jacobs

Dated: November 2, 1989

APPENDIX N.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Anne Anderson, et al.,
Plaintiffs

v.

BEATRICE FOODS CO.,
Defendants

Civil Action
No. 82-1672-S

AFFIDAVIT OF DEBORAH P. FAWCETT

1. My name is Deborah P. Fawcett. I am an associate with the law firm of Hale and Dorr. I graduated from Vassar College in 1971, received a master's degree in urban planning from the University of Pittsburgh in 1973, and graduated from Boston University Law School with honors in 1984.

2. On several occasions since the new trial hearings began, I have been asked whether I saw the YEEARS (or Yankee) Report during the course of pre-trial discovery, trial preparation or the trial itself. On each occasion I said that I had no memory of ever seeing the report, having it sent to me, or having it in my possession.

3. In preparation for the making of this affidavit I reviewed the Yankee Report. Neither the cover page of the report nor its contents are familiar to me. I do not believe that I had ever seen the Yankee Report before these proceedings began.

4. I do not believe that Ms. Ryan ever sent a copy of the Yankee Report to me or discussed its contents with me. I recall Ms. Ryan telling me that there were certain documents, including employee rosters, that she was intending not to produce

at the Foley deposition, but I do not recall her discussing or mentioning the Yankee Report. I also recall receiving from Ms. Ryan certain documents to be produced at the Foley deposition, but I do not believe the Yankee Report was among them. I believe I would remember if Ms. Ryan had discussed the Yankee Report with me or sent it to my attention.

5. I do not believe that I ever saw or became aware of the contents of the Yankee Report in the course of my participation in case preparation after the Foley deposition on January 10, 1986 or in my assistance during the trial.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY.

_____

Deborah P. Fawcett

APPENDIX O.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Anne Anderson, et al.,
Plaintiffs

v.

BEATRICE FOODS CO.,
Defendants

Civil Action
No. 82-1672-S

AFFIDAVIT OF MICHAEL RODBURG

1. My name is Michael Rodburg. I am a member of the law firm of Lowenstein, Sandler, Kohl, Fisher & Boylan, P.C., a 100 person law firm located in Roseland, New Jersey, a suburb or Newark.

2. I received a Bachelor of Science degree from the Massachusetts Institute of Technology in 1968. I graduated, *magna cum laude*, from the Harvard Law School in 1971, and was a member of the Harvard Law Review.

3. My practice is concentrated in the field of environmental law. I am and have been a member of the editorial boards of the Chemical Waste Litigation Reporter (1980 to present), Hazardous Waste & Toxic Torts: Law and Strategy (1987 to present) and Environmental Insurance Litigation Institute (1989 to present). I have been a member of the Practicing Law Institute faculty on environmental matters since 1981.

4. I have published more than thirty articles in the environmental area. Many of those articles address the defense of environmental litigation or administrative proceedings. I have participated in dozens of such proceedings in which I was responsible for overseeing the work of environmental experts.

5. Among the clients I represent is Beatrice Foods, Co. ("Beatrice"). When the Environmental Protection Agency identified Woburn Wells G & H for study in 1982, I was retained by Beatrice to coordinate its response to the EPA. I undertook all of the activities necessary to represent Beatrice in those proceedings, which included the hiring of Woodward Clyde Consultants as experts, and reviewing and commenting upon their plans for the site investigation and testing to be conducted at the property formerly owned by Beatrice.

6. I do not believe that I have ever met Robert Fishman, and believe that I have spoken with him on only one occasion. On or about November 20, 1984, I received a phone call from Mr. Fishman, who identified himself as representing Mr. John J. Riley. Mr. Fishman told me that Mr. Riley wanted to do some environmental testing on the property Mr. Riley or his companies had repurchased from Beatrice.

7. Mr. Riley or his companies were not my clients, but his proposed testing would have occurred on property for which my client was responsible in both the litigation and the EPA proceedings. I told Mr. Fishman that I did not think that Mr. Riley's suggestion or intention to test his property was a good idea. I told Mr. Fishman that any testing done during the period of complex litigation or an environmental proceeding should be done only as part of a properly supervised, scientifically sound, and coordinated testing program under the direction of the attorneys in charge of these aspects of the case. I believe that I also told Mr. Fishman that, so long as Beatrice was responsible for the environmental proceedings and the litigation involving Mr. Riley's property, it was not a good idea for Mr. Riley to do uncoordinated, unilateral testing of the property, and that if he decided to do so (which I had no way of stopping) it could be a factor affecting whether Beatrice was required to indemnify Mr. Riley. This did not strike me as an unusual or unreasonable comment since Beatrice was responsible for

the potential environmental liabilities arising out of its ownership of the Riley property. What I said to Mr. Fishman about unsolicited, unsupervised testing was what I would tell my client or third party and what I believe most lawyers would say in a similar situation.

8. I have reviewed Mr. Fishman's affidavit in which he says that on November 20, 1984, he informed me that a company called Yankee previously had installed monitoring wells on the main tannery parcel. Mr. Fishman did not inform me of those facts. I believe I would have recalled any such information, and I would have been surprised to have learned that during a period where I was coordinating the process of selecting, retaining, and overseeing Woodward Clyde's work, (and during the pendency of litigation), Mr. Riley would unilaterally install wells on his property. My memory is that Mr. Fishman's entire conversation was prospective only, that is, he was talking about future testing that his client wanted to do.

9. I later spoke with Neil Jacobs to tell him of my conversation with Mr. Fishman. I told Mr. Jacobs in substance what I had told Mr. Fishman as described above about uncoordinated, unilateral testing of the property, and we discussed in general the fact that, if Mr. Riley went ahead and did so, it might affect his indemnity. Once again, the views I have expressed to Mr. Fishman did not strike me as a particularly novel or unreasonable proposition in the context of complex environmental proceedings and litigation involving the property.

Michael J. Rodburg

STATE OF NEW JERSEY
COUNTY OF ESSEX

There appeared before me the above-subscribed Michael L. Rodburg and made oath that he had read the foregoing affidavit and the statements therein are true to the best of his knowledge.

_____

Notary Public

ROBERTA FIORETTI
A Notary Public of New Jersey
My Commission Expires July 10, 1994

APPENDIX P.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Anne Anderson, et al.,
Plaintiffs

v.

BEATRICE FOODS CO.,
Defendants

Civil Action No. 82-1672S
B.B.O. No. 183800
B.B.O. No. 104630

MOTION OF MARY K. RYAN FOR LEAVE TO CONDUCT DIRECT AND ADVERSE EXAMINATIONS AND FOR PRODUCTION OF DOCUMENTS

Mary K. Ryan moves that her counsel be permitted to call as witnesses, and to conduct the direct examinations of, Ms. Ryan, Robert A Fishman, Esq., and perhaps Martin Pentz, Esq. and/or Dana Coggins, Esq., and to introduce corroborative documents through their testimony, including those documents listed in Attachment A annexed hereto.

Ms. Ryan further requests that her counsel be permitted to conduct adverse examinations of Jerome P. Facher, Esq., Neil H. Jacobs, Esq., Michael L. Rodburg, Esq., Deborah Fawcett, Esq., and Mary D. Allen, Esq. In conjunction therewith, Ms. Ryan also moves that the defendant be compelled to produce from September 1, 1983 through December 31, 1986 that concern either the Yankee or GEI reports, any geophysical reports concerning the tannery property, or the Riley-Beatrice indemnification agreement, and that are either (1) between Nutter, McClennen & Fish attorneys, on the one hand, and any counsel for the defendant, on the other, or (2) between or among the various attorneys for the defendant.

As grounds for her motion, Ms. Ryan respectfully asserts that such direct and adverse examinations are necessary to afford her the full opportunity for hearing to which she is entitled on the issue of sanctions and on her pending motion for reconsideration, particularly in light of the implications in the defendant's November 2, 1989 submissions. For further elaboration upon these grounds, Ms. Ryan respectfully refers the Court to the accompanying Memorandum In Support of Motion of Mary K. Ryan For Leave To Conduct Direct And Adverse Examinations And For Production of Documents.

MARY K. RYAN

By her attorneys,

Paul B. Galvani
Pierce O. Cray
ROPES & GRAY
One International Place
Boston, Massachusetts 02110-2624
(617) 951-7000

DATED: November 6, 1989

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party by and on November 6, 1989.

Pierce O. Cray

ATTACHMENT A

1. September 21, 1983 letter from Robert A. Fishman, Esq. to Neil H. Jacobs, Esq.;
2. November 23, 1983 Robert A. Fishman notes of telephone calls with Neil H. Jacobs;
3. December 1, 1983 Robert A. Fishman letter to Neil H. Jacobs;
4. December 6, 1983 Robert A. Fishman notes of conversation with Neil H. Jacobs;
5. October 2, 1984 Robert A. Fishman letter to Neil H. Jacobs;
6. October 10, 1984 Neil H. Jacobs letter to Robert A. Fishman;
7. November 15, 1984 Robert A. Fishman notes of telephone conversation with Neil H. Jacobs;
8. November 20, 1984 Robert A. Fishman notes of telephone conversation with Neil H. Jacobs;
9. November 20, 1984 Robert A. Fishman notes of telephone conversation with Michael L. Rodburg;
10. November 28, 1984 Robert A. Fishman notes of telephone conversation with Neil H. Jacobs;
11. December 3, 1984 Robert A. Fishman letter to John J. Riley, Jr.[1];

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[1] This document will be offered over the objection of present counsel for John J. Riley, Jr., who asserts that it reflects a privileged attorney-client communication. Ms. Ryan contemplates disclosing the document pursuant to Massachusetts Supreme Judicial Court Rule 3:07, DR 4-101(C)(4), which specifies that "[a] lawyer may reveal . . . [c]onfidences or secrets necessary to . . . defend himself or his employees or associates against an accusation of wrongful conduct." *See* United States District Court for the District of Massachusetts Local Rule 5(d)(4)(B) (adopting Supreme Judicial Court standards for professional conduct).

12. December 6, 1984 Robert A. Fishman internal memorandum to Margaret A. Metzger, with attached draft language for inclusion in contemplated letter to Norman Waite, Jr., Esq.;

13. January 31, 1985 Dana C. Coggins draft of letter to Norman Waite, Jr., Esq.;

14. January 31, 1985 Robert A. Fishman internal memorandum to Dana C. Coggins;

15. February 7, 1985 Robert A. Fishman internal memorandum to the file;

16. April 5, 1985 Mary K. Ryan notes of telephone conversation with Donald Frederico;

17. April 5, 1985 Mary K. Ryan internal memorandum to Dana C. Coggins, Robert A. Fishman, and Margaret A. Metzger;

18. April, 1985 Mary K. Ryan notes of telephone conversation with Neil Jacobs;

19. April 30, 1985 Dana C. Coggins letter to John J. Riley, Jr.[2];

20. May 1, 1985 Mary K. Ryan notes of telephone conversation with Neil Jacobs;

21. September 18, 1985 Mary K. Ryan letter to Donald R. Frederico, Jr.;

22. October 16, 1985 Mary K. Ryan letter to Neil H. Jacobs;

23. November 27, 1985 Mary K. Ryan internal memorandum to the file;

24. January 2, 1986 Martin Pentz notes of conference with John J. Riley, Mary K. Ryan, and Neil H. Jacobs;

25. January 2, 1986 Martin Pentz Daily Diary;

26. January 3, 1986 Mary K. Ryan internal memorandum to Dana C. Coggins, Margaret A. Metzger, and Robert A. Fishman;

27. January 6, 1986 Mary K. Ryan letter to Neil H. Jacobs;

28. January 9, 1986 Nutter, McClennen & Fish Messenger Delivery Log;

29. January 10, 1986 draft of Objections Of The John J. Riley Company, Inc. To Subpoena Duces Tecum, with accompanying Nutter, McClennen & Fish Central Word Processing Work Request Form;

30. January 10, 1986 Nutter, McClennen & Fish Requests For Messenger Service;

31. January 10, 1986 Nutter, McClennen & Fish messenger log;

32. Mary K. Ryan's personal copy of Yankee Report, in form delivered to Hale and Dorr on or about January 9 or 10, 1986;

33. Beatrice Trial Exhibit Marked For Identification, Exhibit B-189, as attached as Tab B to Defendant Beatrice Foods Co. Opposition to Plaintiffs' Motion for Vacation Of Judgment Entered For Beatrice Based On Alleged Newly Discovered Evidence, October 22, 1987, at p.9.

34. A summary of Nutter, McClennen & Fish daily diaries of time charged by Mary K. Ryan to Riley matters from December 24, 1985 through January 14, 1986;

35. January 14, 1986 Mary K. Ryan letter to Jerome P. Facher;

36. January 22, 1986 Mary K. Ryan letter to David Geronemus, copied to Neil H. Jacobs;

37. February 1, 1986 Mary K. Ryan letter to Neil H. Jacobs and Deborah Fawcett, Esq.;

38. March 18, 1986 Mary K. Ryan letter to Neil H. Jacobs, with enclosed summaries of tests conducted by Riley personnel upon Riley property;

39. March 24, 1986 Mary K. Ryan letter to Neil H. Jacobs;

40. October 6, 1986 Mary K. Ryan internal memorandum to the file;

41. November 29, 1986 Mary K. Ryan internal memorandum to Dana C. Coggins, Robert A. Fishman, Margaret A. Metzger, Robert M. Schlien, and Martin C. Pentz;

APPENDIX Q.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Anne Anderson, et al.,
Plaintiffs,

v.

BEATRICE FOODS CO.,
Defendants.

Civil Action No. 82-1672-S
B.B.O. No. 183800
B.B.O. No. 104630

MEMORANDUM IN SUPPORT OF MOTION OF MARY K. RYAN FOR LEAVE TO CONDUCT DIRECT AND ADVERSE EXAMINATIONS AND FOR PRODUCTION OF DOCUMENTS

In its July 7, 1989 Findings Pursuant To Remand On The Nature Of The Defendant's Misconduct, this Court found that Mary K. Ryan had engaged in "deliberate misconduct" in connection with the January 10, 1986 deposition of Edward Foley, recordkeeper of John J. Riley Company, Inc. On October 11, 1989, Ms. Ryan moved both for reconsideration of this finding and against the recommendation of sanctions, and submitted supporting affidavits from herself and her partner Robert A. Fishman. As set forth in her October 11 submissions, Ms. Ryan's actions in connection with the Foley deposition were undertaken in good faith, after consultation with experienced counsel for the defendant — counsel who were fully aware of the Yankee and GEI reports, as well as their background and context.

On November 2, 1986, the defendant filed its Opposition To Plaintiffs' Motion To Disqualify Hale And Dorr And For General Default ("Defendant's Opposition"), with supporting affidavits from four of the defendant's attorneys. While those

affidavits confirm much of what Ms. Ryan and Mr. Fishman have said on important points, the Defendant's Opposition and its affidavits also contradict the factual basis for Ms. Ryan's motion in certain respects. Among other assertions, the defendant's papers:

— Deny that Mr. Fishman told Messrs. Rodburg and Jacobs on November 20 and 28, 1984 that the Yankee wells had been dug and that testing had been done on the tannery property. Defendant's Opposition at 8-10; Rodburg Aff. ¶ 8; Jacobs Aff. ¶ 12.

— Dispute that Ms. Ryan requested that Mr. Jacobs review the GEI report in the spring of 1985, asserting that such a request by her would have been an "oddity." Defendant's Opposition at 6 n.4; Jacobs Aff. ¶ 8.

— Dispute that Ms. Ryan delivered a copy of the Yankee Report to Mr. Jacobs shortly before Mr. Foley's deposition. Defendant's Opposition at 4-5; Fawcett Aff. ¶ 4; Facher Aff. ¶ 3; Jacobs Aff. ¶¶ 4-6; Mr. Jacobs avers that "[h]ad I seen or read the reports in January 1986 I believe that I would have been aware of this fact." Jacobs Aff. ¶ 4.

— Deny that Ms. Ryan "reviewed or confirmed her judgments at the Foley deposition by checking them with Mr. Facher and Mr. Jacobs." Defendant's Opposition at 11-12; Facher Aff. ¶ 8; Jacobs Aff. ¶ 9; Messrs. Facher and Jacobs assert that Ms. Ryan's consultation with Mr. Jacobs during the deposition would have been "odd" and "unlikely." Defendant's Opposition at 12; Facher Aff. ¶ 8; Jacobs Aff. ¶ 9.

In fact, an extensive series of communications between Mr. Jacobs and Riley attorneys regarding tannery testing and disclosure of the Yankee and GEI reports both preceded and fol-

lowed the Foley deposition. Mr. Jacobs' communications with Riley attorneys on these subjects, many of which are documented in correspondence, memoranda, and notes, included, among others, the following:

— On November 23, 1983, Mr. Jacobs told Mr. Fishman that Beatrice wanted to control any testing done on the Riley property.

— On December 6, 1983, Mr. Jacobs told Mr. Fishman that Mr. Riley should hold off on more testing for a few months.

— On October 10, 1984, Mr. Jacobs acknowledged, by letter, that he had received an October 2, 1984 letter from Mr. Fishman notifying Mr. Jacobs of the retention of GEI.

— On November 20, 1984, Mr. Jacobs told Mr. Fishman that he had not yet consulted Mr. Rodburg about Mr. Fishman's November 15, 1985 conversation with Mr. Jcaobs, in which Mr. Fishman had informed Mr. Jacobs of Mr. Riley's desire to have GEI do additional testing on the tannery property.

— On November 28, 1984, Mr. Jacobs reiterated Mr. Rodburg's position regarding the implications of additional GEI testing for the indemnification agreement, further informing Mr. Fishman that he had not been aware of the Yankee testing, that such testing would have been done without the authorization of Beatrice, and that he did not want to know the results of the tests.

— On January 31, 1985, Mr. Jacobs reiterated to Mr. Fishman Beatrice's position on additional testing by GEI, informed Mr. Fishman that he had discussed the issue several months before with Beatrice in-house counsel Mary Allen, and indicated that he would consult with Ms. Allen about it.

— On February 4, 1985, Mr. Jacobs informed Mr. Fishman that he had spoken again with Ms. Allen and reiterated Beatrice's position regarding additional testing by GEI.

— In April 1985, Mr. Jacobs spoke with Ms. Ryan regarding the disclosure of the GEI report to potential lenders. Mr. Jacobs informed Ms. Ryan that he did not want the GEI report disclosed, that Mr. Rodburg and/or Mr. Jacobs had told Mr. Riley on three occasions not to undertake any new testing, and that Mr. Riley nevertheless undertook testing.[1]

— On May 1, 1985, Mr. Jacobs informed Ms. Ryan that he had spoken with Ms. Allen regarding the release of the GEI report, that Beatrice would not change its position, and that he would not read the report.

— On October 16, 1985, Mr. Jacobs received a letter from Ms. Ryan informing him of the request of the Environmental Protection Agency ("EPA") for production of the GEI report.

— On January 2, 1986, Mr. Jacobs attended a meeting at the tannery at which he and Ms. Ryan discussed the work product objection to the Yankee and GEI reports at Mr. Foley's deposition.

— January 10, 1986, prior to Mr. Foley's deposition, Mr. Jacobs called Ms. Ryan with respect to the production of the two reports at the deposition and commented on his reaction to the Yankee report, which he had just read.

— On January 14, 1986, Mr. Jacobs and Mr. Facher were informed by Ms. Ryan that plaintiff's counsel had not yet moved to compel production of the two reports.

— In March 1986, Mr. Jacobs received from Ms. Ryan a schedule of testing that had been done on the tannery property, including work by Yankee.

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[1] Riley attorneys consistently have objected to the defendant's interpretation of the indemnification agreement.

— On October 3, 1986, Mr. Jacobs discussed with Ms. Ryan the possible disclosure of the GEI report to the EPA in response to an informal EPA request.

— On November 28, 1986, Mr. Jacobs discussed Ms. Ryan's disclosure of both reports to the EPA in response to the EPA's formal information request.

In light of this extensive history of communications with Riley counsel regarding the two reports, Mr. Jacobs certainly was a logical, rather than an "odd" or "unusual," person for Ms. Ryan to call during the deposition with respect to Mr. Foley's testimony on the subject. While Mr. Facher may have had somewhat less exposure to the Yankee and GEI reports, he, too, had reviewed the Yankee report by the time of the Foley deposition, which he attended. *See, e.g.*, Statement Of Jerome P. Facher In Response To Court Order Of December 22, 1988, at 8-9. By his own admission, he was aware of the objection to its production, *id.*; by the fact of his attendance at the deposition, he was aware of Mr. Foley's testimony. It therefore also made sense for Ms. Ryan, who represented a non-party witness, to consult with Mr. Facher about Mr. Foley's testimony, as she did.

It should be emphasized that the purpose of Ms. Ryan's Motion For Reconsideration is to demonstrate to the Court that she never engaged in any misconduct, and acted in good faith at all times. It is not Ms. Ryan's intention to turn her defense into attack on other lawyers, and hopefully it will not be so construed. Rather, the intent is that this Court have all of the facts before it in deciding whether she should be sanctioned for not producing the two reports, which, we submit, were work product documents. More important, her decision to withhold the reports was made in good faith and after consultation with Beatrice's lawyers, who were fully informed of the premises for her decision.

It also bears emphasis that Ms. Ryan agrees completely with the defendant's position that the plaintiffs did not suffer a substantial impairment of their ability to prepare for trial by not having the reports identified as withheld. Had the reports been so identified, it is hardly a foregone conclusion that the plaintiffs would have succeeded in any motion to compel, as the documents were immune from discovery under the work product doctrine. Moreover, the plaintiffs did not need the reports to consider whether to pursue the tannery as a potential source of contamination of Wells G and H, for all of the reasons demonstrated to the Court by the defendant's counsel during the latest hearings. Contrary to the plaintiffs' assertions, the record is devoid of evidence that they aggressively sought access to the tannery site. Finally, even if the plaintiffs had had the reports, the documents would have added nothing of significance to the plaintiff's knowledge, again for all the reasons emphasized by the defendant's counsel.

In short, the contretemps between Ms. Ryan and the defendant's counsel is not the result of an effort to shift blame from the former to the latter. No one should be "blamed." Rather, Ms. Ryan simply wants the Court to understand that she is a responsible, conscientious attorney — indeed, a past president of the Women's Bar Association — who acted in good faith at all times and, when faced with a legitimate question in this complex situation, sought guidance from Beatrice's counsel, for highly understandable reasons. She specifically sought and obtained such guidance in connection with the Foley deposition and, under the circumstances, does not deserve to be singled out for a devastating finding of misconduct and, perhaps, resulting sanctions in these highly publicized proceedings.[2]

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[2] As the Court knows, plaintiffs' counsel publicly announced his attempted filing in this Court of a disciplinary Complaint against Ms. Ryan, with an accompanying request for appointment of "independent counsel."

It also bears emphasis that Ms. Ryan's proof will not rest upon oral testimony alone. For example, while Mr. Jacobs "has no memory" that on November 28, 1984 he was informed of the Yankee testing and did not want to know the results, Jacobs Aff. ¶ 12, a December 3, 1984 letter to Mr. Riley from Mr. Fishman corroborates this very point. Similarly, while Mr. Jacobs "does not recall" that Ms. Ryan spoke to him in the spring of 1985 regarding the disclosure of the GEI report and that he refused to review the report, Jacobs Aff. ¶ 8, a May 1, 1985 postscript to an April 30, 1985 letter from Ms. Ryan's partner Dana Coggins to Mr. Riley again proves otherwise.[3]

The above summary constitutes a sampling of the extensive documentary record of correspondence, internal memoranda, telephone notes, and other materials corroborating the statements made in Ms. Ryan's and Mr. Fishman's affidavits. A list of corroborating documents is annexed as Attachment A to the Motion of Mary K. Ryan For Leave To Conduct Direct and Adverse Examinations and For Production Of Documents.[4]

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[3] These documents will be offered over the objection of present counsel for John J. Riley, Jr., who asserts that they reflect privileged attorney-client communications. Ms. Ryan takes the position that she is free to disclose the documents pursuant to Massachusetts Supreme Judicial Court Rule 3:07, DR 4-101(C)(4), which specifies that "[a] lawyer may reveal . . . [c]onfidences or secrets necessary to . . . defend himself or his employees or associates against an accusation of wrongful conduct." *See* United States District Court for the District of Massachusetts Local Rule 5(d)(4)(B), (adopting Supreme Judicial Court standards for professional conduct). Because of this disagreement between counsel, Ms. Ryan will brief this issue and submit to the Court the two letters in question for its *in camera* review and ruling. To demonstrate the accuracy of the representations in this Memorandum with respect to communications between Nutter, McClennen & Fish and counsel for the defendant, Ms. Ryan also willingly would submit all other corroborative documents to the Court for its *in camera* review, as Mr. Schlictmann was permitted to do recently in response to Beatrice's interrogatories.

[4] Ms. Ryan intends to introduce these documents as, variously, prior consistent statements, past recollections recorded, and/or records of regularly conducted activity. *See* Fed. R. Evid. 801(d)(1)(B), 803(5), and 803(6). Pursuant

Ms. Ryan certainly should be afforded full and adequate process to present evidence on the issue whether sanctions should be imposed upon her. *Cf. Donaldson* v. *Clark*, 819 F.2d 1551, 1561 (11th Cir. 1987) ("[t]he more serious the possible sanction . . . the more process that will be due"). At a minimum, full and adequate process requires that counsel for Ms. Ryan be permitted to introduce evidence on her behalf. Accordingly, Ms. Ryan moves the Court for leave to conduct direct examination and inquiry.[5]

Specifically, Ms. Ryan requests that this Court permit her counsel to conduct direct examinations of Mr. Fishman and her, as well as perhaps their colleagues Dana C. Coggins and Martin Pentz. Through these witnesses, Ms. Ryan further anticipates introducing into evidence the corroborating documents referenced above. Plaintiffs' counsel has indicated that he intends to call Ms. Ryan and Mr. Fishman as witnesses on the issue of sanctions. However, given Ms. Ryan's overriding interest in the hearing, which will address her October 11 motion and encompass the possibility of a recommendation of sanctions against her, her own counsel should be entitled to present the direct evidence on her behalf and to conduct cross and adverse examinations of other witnesses. If her counsel is not allowed to examine witnesses on her behalf, Ms. Ryan will be denied representation in a hearing directly affecting her interests. Such a result effectively would preclude Ms. Ryan of the "opportunity for a hearing on the record," *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 767 (1988), to which she is entitled.

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to Fed. R. Evid. 1004(3), Ms. Ryan hereby requests, for purposes of formal compliance with the best evidence rule, that the defendant produce at the evidentiary hearing any originals of any documents on Attachment A that it has in its possession, custody, or control, including but not limited to Nos. 1, 3, 5, 21, 22, 27, 35, 37, 38, and 39.

[5] Indeed, as set forth in the authorities cited at p. 27, n.15 of her Memorandum in Support of Motion For Reconsideration, Ms. Ryan is entitled to a specification of possible sanctions before they are imposed.

For the reasons already cited, Ms. Ryan also specifically moves that, aside from direct examinations of Nutter, McClennen attorneys: (1) her counsel be permitted to conduct adverse examinations of defendant's counsel Jerome P. Facher, Esq., Neil H. Jacobs, Esq., Michael L. Rodburg, Esq., Deborah Fawcett, Esq. and Mary D. Allen, Esq.; and (2) the defendant produce all documents, including handwritten notes, internal memoranda, diary entries, and correspondence, constituting or reflecting communications during the period from September 1, 1983 through December 31, 1986 that concern either the Yankee or GEI reports, any geophysical reports regarding the tannery property, or the Riley-Beatrice indemnification agreement, and that are either (A) between Nutter, McClennen attorneys, on the one hand, and any counsel for the defendant, on the other, or (B) between or among the various attorneys for the defendant.

For the foregoing reasons, Mary K. Ryan respectfully requests that the Court grant her Motion For Leave To Conduct Direct And Adverse Examinations And For Production Of Documents.

MARY K. RYAN

By her Attorneys,

Paul B. Galvani
Pierce O. Cray
ROPES & GRAY
One International Place
Boston, MA 02110-2624
(617) 951-7000

DATED: November 6, 1989

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party by and on November 6, 1989.

Pierce O. Cray

APPENDIX R.

VOLUME XIV

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ANNE ANDERSON, *et al.*

v.

BEATRICE FOODS CO.

CIVIL ACTION
No. 82-1672-S

BEFORE: SKINNER, D.J.

APPEARANCES:

Jan Richard Schlichtmann, Esq. and William J. Crowley, III, Esq., Schlichtmann, Conway, Crowley & Hugo, 171 Milk Street, Boston, MA 02109

Jerome P. Facher, Esq. and Neil H. Jacobs, Esq., Hale & Dorr, 60 State Street, Boston, MA 02109

Courtroom No. 6
Federal Building
Boston, MA 02109
March 14, 1989
9:00 o'clock a.m.

Valerie T. Wong,
Per Diem Reporter
P.O. Box 3076
Boston, MA 02101
617 324-1420

THE COURT: Did I let that letter in or not?

MR. SCHLICHTMANN: No.

MR. FACHER: I am not sure, but I . . .

THE COURT: That is right.

MR. SCHLICHTMANN: At this point in the proceedings, your Honor, in light of Mr. Riley's testimony about the fact he had the documents at home or got the latest submission, I had made an original subpoena, which you quashed, to Mr. Riley and Mr. Jones which you thought at the time was overbroad. In light of Mr. Riley . . .

THE COURT: I still think so.

MR. SCHLICHTMANN: I light of Mr. Riley's testimony, your Honor, do you not think it is appropriate for your Honor to request of the attorney for these clients if they have done a full and complete search of the documents, their clients have, and have they determined are there any other documents relating to this case which were withheld for one reason or another, and identify those to your Honor to decide if there is . . .

THE COURT: Is there any other documents?

MR. FACHER: I don't know what he means by documents which were with them. I have a room as big as this filled with documents about chemicals, about medicals, about leukemia.

THE COURT: Do you have any tannery documents? Do you have any stuff that was in the office?

MR. FACHER: I don't have any.

THE COURT: Do you have any?

MS. RYAN: I have tannery documents coming out of my ears because the tannery is shut down. I took the documents and put them in a warehouse. Some are in my office.

Mr. Schlichtmann was aware during pre-trial discovery, during the trial of this case there were numerous files that were not searched. This was the subject of testimony at the

Foley deposition and at pages 18-101, specifically of Mr. Foley's trial testimony. There was further testimony about formulas, et cetera, documents that were not searched that were not subpoenaed to the case. I have not searched those to this day.

THE COURT: Okay. I don't think you should.

MS. RYAN: And laboratory files was another subject.

MR. SCHLICHTMANN: In light of that statement by Ms. Ryan, this is the eighth year of litigation in this case, going in the eighth year, I had to stumble on the examination of Mr. Riley which has significance in my mind, and I hope you saw the significance of these documents . . .

MR. FACHER: There was no stumbling. Mr. Lenzner took the deposition.

MR. SCHLICHTMANN: I am talking about Riley, documents he withheld and were not produced.

In light of the statement by counsel, what she has told your Honor is Mr. Facher and Hale & Dorr can't tell you to this day, right now, can't tell you if the production of document request, the answers to interrogatories are full and complete. They have told you they delegated that whole responsibility over here and this woman has told you she has not fulfilled that responsibility of searching.

So right now you don't know, I don't know, and these attorneys can't certify to you that all documents were searched.

THE COURT: You want to go to the warehouse.

MR. SCHLICHTMANN: Yes.

MS. RYAN: What I would like to say . . .

MR. FACHER: Part of your order was these things were objected to, they weren't pursued. I think I remember some ground rules when we started out.

THE COURT: Yes.

MR. FACHER: We have gone into never-never land.

MR. SCHLICHTMANN: Your Honor, these documents, May of 1982, were shown. They told us they didn't exist. We showed your Honor they . . .

MR. FACHER: That is not true.

MR. SCHLICHTMANN: Mr. Riley told you. We found out they do exist. We have every reason to believe they don't know what is out there or they have some idea what is out there. I think at this point it is . . .

THE COURT: You are talking about a warehouse full of . . .

MR. SCHLICHTMANN: You don't know; that is the point.

THE COURT: I will not carry this beyond the relatively small limits. You are suggesting the kind of discovery that is turning what is supposed to be a prompt hearing into a major trial. I am calling an end to it.

MR. SCHLICHTMANN: For God's sake, we are here because . . .

THE COURT: I know why you are here.

MR. SCHLICHTMANN: Because information was withheld. And all we have heard is more information that was withheld. How can you say . . .

THE COURT: Can we stop at any time?

MR. SCHLICHTMANN: No. But you have made an order, your Honor. This document that was produced by Mr. Riley directly in violation of your Honor's December of 1988 order. That was not part of the submission. It was a Beatrice document and should have been part of the submission. They may have excuses as to why. There is no excuse, none which says it should not be produced, essentially, in light of your order.

THE COURT: You want to go through this warehouse?

MR. SCHLICHTMANN: Yes.

MS. RYAN: Your Honor, Mr. Schlichtmann had the opportunity to take me to Court and say: Ms. Ryan, your refusal to search the lab is unreasonable, your refusal with regard to lab files.

Mr. Foley was deposed on Friday afternoon by Mr. Lenzner, assisted by Mr. Geronimus. He stood up in this Court on Tuesday, January 14th. I heard Mr. Lenzner say: I believe that the Riley Leather deposition is complete. I got up and said: There are some open matters. These are the kind of matters that were open.

Mr. Schlichtmann deliberately chose to forego his right to do that. He could have subpoenaed these documents to trial. He did not do so. That is the basis of which we say there is no wrongful conduct here. We are talking about a different question than the question of what happened before the trial. The time and place for that was then.

MR. SCHLICHTMANN: Beatrice had an obligation to inquire. They have not made a search.

THE COURT: I will tell you what I will do. I will have to redo all the discovery documents to find out what you asked for. I am not certain that you asked for all that you now say you asked for. I repeat what I have said a number of times: No litigant has an obligation to volunteer or produce anything that is not demanded in the discovery documents. And if an objection is posed to its production, it is the obligation of the demanding side to proceed under Rule 37 to get enforcement.

At the present time I will not make any order. These hearings will stay open until I make a determination. And if upon review of all the documents there is a record, there is some justification for it, I may order it. But at the present time I will not.

Now, if you tell me that you are not going to put on the attorneys, I will leave it at that. You can put on your toxicologist tomorrow and you will rest. You are putting in whatever documents you have.

MR. SCHLICHTMANN: Yes.

APPENDIX S.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 82-1672-S SKINNER, D.J.

ANNE ANDERSON, ET AL.

v.

BEATRICE FOODS CO.

Third Day of Hearing, Afternoon Session

APPEARANCES:

Schlichtmann, Conway, Crowley & Hugo (by Jan Schlichtmann, Esq., Kevin Conway, Esq., William J. Crowley, Esq. & Michael R. Hugo, Esq.), 171 Milk Street, Boston, MA 02109, on behalf of the Plaintiffs.

Hale and Dorr (by Jerome P. Facher, Esq., Neil Jacobs, Esq., James L. Quarles, III, Esq., and Richard L. Hoffman), 60 State Street, Boston, MA 02109, on behalf of the Defendant.

Courtroom No. 6
Federal Building
Boston, MA 02109
Thursday, October 20, 1989
1:40 p.m.

Ellen Cunio
Court Reporter
784 East Broadway
South Boston, MA 02127 — 269-0646
Mechanical Steno – Transcript by Computer

THE COURT: But they had it before they put this thing out?

MR. SCHLICHTMANN: The EPA had it, but whatever the government's incompetency . . .

MR. FACHER: On, come on.

THE COURT: Take it away.

[End of side bar conference]

MR. SCHLICHTMANN: May I take it from Your Honor's ruling, just for purposes of the record, that I'm foreclosed from entering the area of what the USGS — what the analysis of the USGS was about ground water flow?

THE COURT: Yes, yes, yes. Not as to the data.

MR. SCHLICHTMANN: No, not as to the USGS data.

THE COURT: Which was stacked up here during the trial. But as to the conclusions, opinions, speculations, hypotheses, et cetera, et cetera, that have come out since.

MR. SCHLICHTMANN: All right.

May I just have a second, Your Honor?

THE COURT: Sure.

[Pause]

MR. SCHLICHTMANN: I have no more questions, Your Honor.

THE COURT: Well, bear with me, Professor. I haven't had the chance to rehearse questions, so I may be struggling a little. Let me ask you this. Are you familiar with Dr. Pinder's testimony with reference to the migration of pollutants from the 15 acres lying more or less due west of Wells G and H?

THE WITNESS: I know that he concludes that the contaminants or solute would move towards G and H. The details of his opinion I do not know. I did not read about his opinion whatsoever.

THE COURT: Do I take it, then, that you would not be able to say whether the information that you have described having to do with this tributary aquifer would have changed in any way his opinion on that subject?

THE WITNESS: What I would conclude . . . not by differencing his opinion from mine, but what I would conclude would be that if he had and any other analyst at this site had information on water flowing to the aquifer from the west, they would have had to incorporate that information into their results, and I believe that it would have influenced their findings and their consensus.

THE COURT: In what respect?

THE WITNESS: The respect is . . . as I said at the very, very beginning, every gallon of water that comes from the west is a gallon that does not have to come from either the 15 acres or the Aberjona River. It allows . . . the data provided in Yankee and of this tributary aquifer gives us more information to the west. And any time you have more information, it allows you to better calibrate and better understand an aquifer.

THE COURT: Well now, let me put the question perhaps another way. Dr. Pinder denied that the river was a charge barrier because of his view of the impermeability of the lining of the river. Is that substantially a correct summary of his testimony, as you recall it?

THE WITNESS: Yes. I had heard that. In fact, not only have I heard that particular theory of Dr. Pinder's through the courts but through fellow hydrogeologists.

THE COURT: Now, it's your opinion that the river is in fact a charge barrier, is it not?

THE WITNESS: No. It is definitely recharging the ground water system there, the aquifer.

THE COURT: Water is coming down out of the river?

THE WITNESS: Yes, but it can do that without being a barrier.

THE COURT: I see. Do you think that the information concerning the flow of water down out of this tributary aquifer has any bearing on the question of whether the river was a charge barrier or not?

THE WITNESS: Yes. What it brings . . . or casts . . . where the data would be directed would be at the word "barrier," because I firmly believe that water does enter the system or recharge the system along the river. But whether the river is a barrier, I think that the information embodied in the Yankee and GEI report . . . in other words, the definition of this subaquifer to the west . . . does help resolve that issue. And the reason it helps resolve that issue is I am now introducing more water into the basin. Yankee . . . not Yankee. Riley Well 2 does not have to go to the river to get its water.

THE COURT: I understand that. Would that be true with respect to the area to the north that is more or less on a parallel plane with the Wells G and H?

THE WITNESS: I believe so. I think that what I'm doing is saying that Riley Well 2 can get some of its water from the south and the west and, therefore, it doesn't have to reach up to the north and, in particular, have this ground water, this bedrock. . . .

THE COURT: Can you come back? I'm worried about Wells G and H.

THE WITNESS: Wells G and H are going to draw their water from certainly the east of the river, from the river itself, and from areas to the west. And, in fact, the influence cone for G and H clearly extends west of the river.

THE COURT: Well, is your opinion concerning the drawing from the west of the river at the parallel of latitude, so to speak, of G and H influenced in any way by this new information about the tributary aquifer?

THE WITNESS: Yes, very much so. And the reason I say that is that, unfortunately, the only data that we have for the aquifer is when G and H were pumping at a very high rate, when Riley well 2 was pumping at a very high rate and unfortunately, the long-term average is what we're looking for. In other words, when Riley Well 2 has had its flow averaged out over the entire day. And I would love to have data that

would be very conclusive as to what's going on one way or the other.

THE COURT: Do you feel you have adequate data to come to an opinion, to a reasonable scientific probability?

THE WITNESS: Yes, I do. I think that through having the extra data, there's a better calibration or a better understanding of the aquifer and, therefore, a better ability to essentially synthesize what was happening in the long term.

THE COURT: Cross examination?

MR. SCHLICHTMANN: Your Honor, I just realized that I left out one little, tiny area that you had heard before, but I didn't want the witness to . . .

THE COURT: If I heard it before, don't do it again.

MR. SCHLICHTMANN: Actually, it hasn't been . . . we've touched on it, but I would . . . it would just take me a minute.

THE COURT: All right.

MR. SCHLICHTMANN: It's the issue of the monitoring of the Yankee wells.

VOLUME VI

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ANNE ANDERSON, *et al.*

v.

BEATRICE FOODS

CIVIL ACTION
No. 82-1672-S

BEFORE: SKINNER, D.J.

SIXTH DAY OF HEARING

Jan Richard Schlichtmann, Esq., William J. Crowley, III, Esq., Schlichtmann, Conway, Crowley & Hugo, 171 Milk Street, Boston, MA 02109

Jerome P. Facher, Esq. and Neil H. Jacobs, Esq., Hale & Dorr, 60 State Street, Boston, MA 02109

Courtroom No. 6
Federal Building
Boston, MA 02109
October 26, 1989
2:00 o'clock p.m.

Valerie T. Wong,
Per Diem Reporter
P.O. Box 3076
Boston, MA 02101
617 324-1420

THE COURT: Okay.

Q. During the cross examination you were asked questions by both his Honor and Mr. Facher about whether the Yankee and GEI data directly bore on groundwater flow in the 15 acres, do you remember being asked questions about that?

A. Yes.

Q. I know you gave your opinion that it does affect it. Is there a simple illustration that you can give his Honor to show how the data obtained by Yankee and GEI directly bore on groundwater flow specifically north of Riley Well 2 on the 15 acres?

A. Yes, there is.

MR. FACHER: I object, your Honor.

THE COURT: Overruled.

Q. Would you please do that?

MR. FACHER: We are rolling down the hill.

THE COURT: I don't know.

A. If one superimposes the vector plots obtained by a, pumping Riley at 161 gallons per minute, pump G and H at 700 and 400 gallons per minute, all transmissivities being exactly the same with, between two cases I will show you, having the same infiltration between two cases and simply look at the impact of the velocity vectors by changing one parameter only, that is the inflow of water underneath the tannery, then you can very clearly see the impact of flow in the vicinity of the tannery on flow north of Riley Well 2.

THE COURT: What is it? If it is so clear, let me see.

A. This is the position of two exhibits already entered into evidence.

Q. Could you explain to his Honor what is revealed by that?

MR. FACHER: I think we had these exhibits. It is not redirect examination.

THE COURT: There may be something I didn't understand the first time.

A. In this exhibit the diverging arrows north of Riley Well 2 indicate the influence of changing one and only one parameter, that is the inflow to the system at the tannery. Everything else is constant throughout the whole domain. One could go about an analysis and changing the Wells G and H, holding the change, the flows at G and H, and then again just turning one thing and only one thing, that is the flow at tannery.

You can see the importance of that flow component. It changes the calculated velocities north of Riley Well 2.

Looking at these diverging arrows, the more northerly arrow occurs when there is a high flow coming in at the tannery, the more southerly arrow results from the lower flow in the vicinity of the tannery. So by just changing the flow I can drive those arrows either northerly or southerly.

THE COURT: But once you get up . . .

A. North of Lechmere, the effect diminishes.

THE COURT: You don't have any effect of it at all?

A. No.

Q. Certainly at the 15-acre property, but the arrows, changing vectors are actually right on the middle . . .

THE COURT: That is the question I just asked. I got an answer. It does not agree with what you just said. Let's move onto something else.

MR. SCHLICHTMANN: Could I have that marked as an exhibit?

THE COURT: Sure.

MR. SCHLICHTMANN: That is 3028.

THE COURT: Does that document show the location of Wells G and H?

MR. SCHLICHTMANN: Yes. The arrows converge. This is the Lechmere building.

THE COURT: The relationship between the wells and Lechmere is not the same on this thing as appears on the one on the board. This one shows the well being more or less in

the center and that shows the well being more due east than the northern corner of the building.

MR. SCHLICHTMANN: I think it is pretty close, your Honor.

THE COURT: Okay. You will make sure I have a copy of all these things before I leave?

MR. SCHLICHTMANN: Certainly.

[Diagram, marked Plaintiffs' Exhibit No. 3028.]

Q. Is this document sufficient to show that effect, Doctor Sykes?

A. Yes.

Q. That you just talked about?

A. Yes.

Q. I show you an exhibit, Doctor Pinder's . . .

APPENDIX T.

CIVIL DOCKET CONTINUATION SHEET

Anderson v. *Beatrice Foods*

U.S.A.C.-C.A. No. 82-1672-S

DATE	NR.	PROCEEDINGS
1989		
Oct. 16		SKINNER, D.J., Further evidentiary hearing begins; defts testimony; evidence; continued to 10/17/89 @ 2:00 p.m.
Oct. 17		SKINNER, D.J., Hearing continues; testimony; evidence; deft rests; hearing to resume on Friday, 10/20/89 @ 9:00 a.m.
Oct. 20		SKINNER, D.J., Hearing continues; defts testimony evidence; luncheon recess; testimony resumes; evidence; continued to 10/23/89 @ 2:00 p.m.
Oct. 23		SKINNER, D.J., Hearing continues; pltfs testimony evidence; continued to 10/24/89 @ 2:00 p.m.
Oct. 24		SKINNER, D.J., Hearing resumes; testimony; evidence/ continued to 10/26/89
Oct. 26		SKINNER, D.J., Hearing resumes; testimony; evidence; continued to 10/27/89 @ 2:00 p.m.
Oct. 27		SKINNER, D.J., Hearing resumes; pltfs closing arguments; defts closing argument; decision reserved
1989		
*Jan. 26		37 Vols. of Transcripts filed.
Dec. 18		37 Vols. of Transcripts & #534,543, forwarded to court of appeals on supp. cert.
*Nov. 14	635A	Oppo of J. Riley Jr. to mtn for leave to disclose privileged documents & Alternate Request for entry of protective order filed. c/s

DATE	NR.	PROCEEDINGS
1989		
	636A	Memo of Riley, Jr. in oppo to Ryan's mtn for leave to disclose privilege documents filed c/s
	637A	Partial oppo of Riley & Co. to pltf's mtn for hearing & Production of documents regarding Ryan & Fishman Affidavits, filed c/s
Nov. 15		SKINNER, J. Hearing on all pending motions; deft Riley's motion for reconsideration is denied; Motion of Mary Ellen Ryan to disclose privileged documents is denied; Motion of Mary Ellen Ryan for reconsideration is denied; Motion of Mary Ellen Ryan to conduct examination is denied; defts motion for view of Tannery Site is denied; no action taken on motion for general default; all other motions taken under advisement; Counsel to file no further pleadings, etc., pending further order of the Court.
Dec. 4	635	SKINNER, D.J., Memorandum on motions of John J. Riley, et al. and Atty. Mary Ryan for reconsideration and motion of Atty. Mary Ryan to participate in hearings on sanctions, ENTERED. cc/cl. ". . . Accordingly, I DENIED all of the above motions."
Dec. 7		Pleading # 635, forwarded to court of appeals on supp. cert.
Dec. 12	636	SKINNER, D.J. Final report to the court of appeals . . . . Following Remand, cc/cl Final Report & Impounded pleadings, forwarded to court of appeals on supp. cert.
*Feb. 10	637	Transcript of Feb. 2 1989, filed c/s
Dec. 19		12 Vols & Exhibits, pleadings Copies, & pleadings # 186, 544, 545, 546, 547, 611, 612, 619, 620, 621, 628, 635A, 636A, 637, 637A, forwarded to court of appeals on supp. cert.

APPENDIX U.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 82-1672-S

SKINNER, D. J.

ANNE ANDERSON, ET AL.

v.

BEATRICE FOODS CO.

Hearing

APPEARANCES:

Schlichtmann, Conway, Crowley & Hugo (by Jan Schlichtmann, Esq., Kevin Conway, Esq., William J. Crowley, Esq. & Michael R. Hugo, Esq.), 171 Milk Street, Boston, MA 02109, on behalf of the Plaintiffs.

Hale and Dorr (by Jerome P. Facher, Esq., Neil Jacobs, Esq. & James L. Quarles, III, Esq.), 60 State Street, Boston, MA 02109, on behalf of the Defendant.

Courtroom No. 6
Federal Building
Boston, MA 02109
2:20 p.m., Tuesday
October 3, 1989

Marie Cloonan
Federal Court Reporter
1690 U.S.P.O. & Courthouse
Boston, MA 02109 – 426-7086
Mechanical Steno – Transcript by Computer

knew nothing about the Yankee investigations or reports or the GEI investigations and reports.

THE COURT: Oh, no.

MR. SCHLICHTMANN: You are not allowing them 1 through 8 because you said you are accepting my representation.

THE COURT: I'm accepting your representation that you learned of those particular documents on a certain day from the EPA. What frankly concerns me, and it's the only reason it would be relevant, if you had comparable information from a different source, substantially the same information or comparable information, why, then, that would be quite relevant on the question of whether there was interference, as I see it.

MR. SCHLICHTMANN: I want to deal with that issue.

THE COURT: That's the real issue.

MR. SCHLICHTMANN: I represent to your Honor, as I have to begin with that your Honor has accepted, we didn't know about the Yankee investigation or the GEI investigation, let alone the reports. We didn't know about the investigation or the presence of the wells on that property until we discovered it in September of '87. There was no information that we obtained telling us that those things existed. Those are the initial things.

THE COURT: Fine. If you say that, then there's no

* * * * * * *

THE COURT: If there is something to suggest that you had something more than guesswork and surmise, that goes to the point. Because what you say, having in mind we're not dealing with good and evil in the abstract here, we're dealing with a question of a new trial. As I understand it, the law of trial is that barring some improper interference, if you have the information and if you have what you need to make the

shot and don't shoot, that's the end of it, that's the rule of repose. So it seems to me, at least I suggest to you, at least a superficial inquiry of the kind asked for here designed to see whether or not you did have something beyond guesswork and surmise, I would think would be within what the Court of Appeals was talking about. And I think that's the whole — I think you put your finger right on the key phrase. It is because of that, that I give some consideration to 11 and 12.

MR. SCHLICHTMANN: That's the one I want to answer, your Honor.

THE COURT: Good.

MR. SCHLICHTMANN: The issue is not whether I would have taken advantage of this information. The issue is whether I could have taken advantage, and there's a difference, a very important difference.

THE COURT: I'm aware of that, but that is not the same as the issue of whether you already had the information.

APPENDIX V.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
No. 82-1672-S

SKINNER, D. J.

ANNE ANDERSON, ET AL.

v.

BEATRICE FOODS CO.

First Day of Hearing

APPEARANCES:

Schlichtmann, Conway, Crowley & Hugo (by Jan Schlichtmann, Esq., Kevin Conway, Esq., William J. Crowley, Esq. & Michael R. Hugo, Esq.), 171 Milk Street, Boston, MA 02109, on behalf of the Plaintiffs.

Hale and Dorr (by Jerome P. Facher, Esq., Neil Jacobs, Esq. & James L. Quarles, III, Esq. and Richard L. Hoffman), 60 State Street, Boston, MA 02109, on behalf of the Defendant.

Courtroom No. 6
Federal Building
Boston, MA 02109
2:20 p.m., Monday
October 16, 1989

Marie L. Cloonan
Federal Court Reporter
1690 U.S.P.O. & Courthouse
Boston, MA 02109 – 426-7086
Mechanical Steno – Transcript by Computer

refers to would only prejudice us on a point which is irrelevant to these proceedings.

THE COURT: All right. Do you want to be heard Mr. Quarles?

MR. QUARLES: Yes, your Honor, if I may. The relevance is that comes from Mr. Schlichtmann in almost every filing that he's made. He has said: I would have done some testing. Indeed, the first thing he did was file Mr. Drobinski's affidavit saying: Gosh, if I had known about Yankee, I would have done some testing.

Mr. Schlichtmann is the person who says this is what he would have done. We did it for the purpose of demonstrating that had he done it, he would have come up empty because these chemicals, which don't come and go overnight but are there for long, long periods of time, simply aren't there. They weren't there in '80, they weren't there in '75, they weren't there in '86 and they're not there in 1989. It is Mr. Schlichtmann who has said from day one, this is what he would have done. I believe Mr. Drobinski said, "I would have done an efficient and economic survey." Well, an efficient and economical survey would have demonstrated this property is clean.

THE COURT: All right.

As to Mr. Schlichtmann's first point, that's a rather perilous position to draw inferences about the importance of testing from the position of the parties given the summer's history.

As to the question of point of relevance or perhaps more accurately the prudential conduct of these hearings, I'm going to exclude the evidence for this reason: I have said right along that I'm not going to retry the case or try the case prior to the allowance of a motion for a new trial. And if I've said it once, I've said it a hundred times, so this is what we're getting into. If you have your expert there, why, then, we can't just drop the matter. Mr. Schlichtmann is entitled to hire

an expert and go up there and make his own survey and we're back into a new trial before a new trial has been allowed.

Now, in the summer I thought that it would be some value in having a court-appointed expert who does not set up the trial situation, but as that investigation progressed, it turned out that there has been material alterations in the geography and in the site and the relevance now or ever of testing at this point is certainly in question.

I further took the position that I wasn't interested in any slap-dash quickie testing. I said to Mr. Dewling that I wanted a first-class 100 percent thorough, complete testing and nothing else would have any probative force at this point in the history of this case. That is still my position. All of those are still my positions and, consequently, I sustain the plaintiffs' objection and exclude this evidence.

MR. QUARLES: Your Honor, if I may. Two points occur.

THE COURT: Okay.

MR. QUARLES: We were the people who said let's do the full class test.

THE COURT: I understand it.

MR. QUARLES: We were the people who were asked to pay a very substantial amount of money.

THE COURT: No doubt about it.

MR. QUARLES: We said we don't like to do it, don't particularly want to do it, but it's important enough that we will do it.

THE COURT: But at that point the circumstances were such that I said no, and having said that, I'm standing by it and not permitting a substitution of an adversarial and necessarily cursory investigation.

MR. QUARLES: Well, your Honor, I think if you heard the testimony, it's not that cursory.

THE COURT: I understand the difference between this gas thingamajig and —

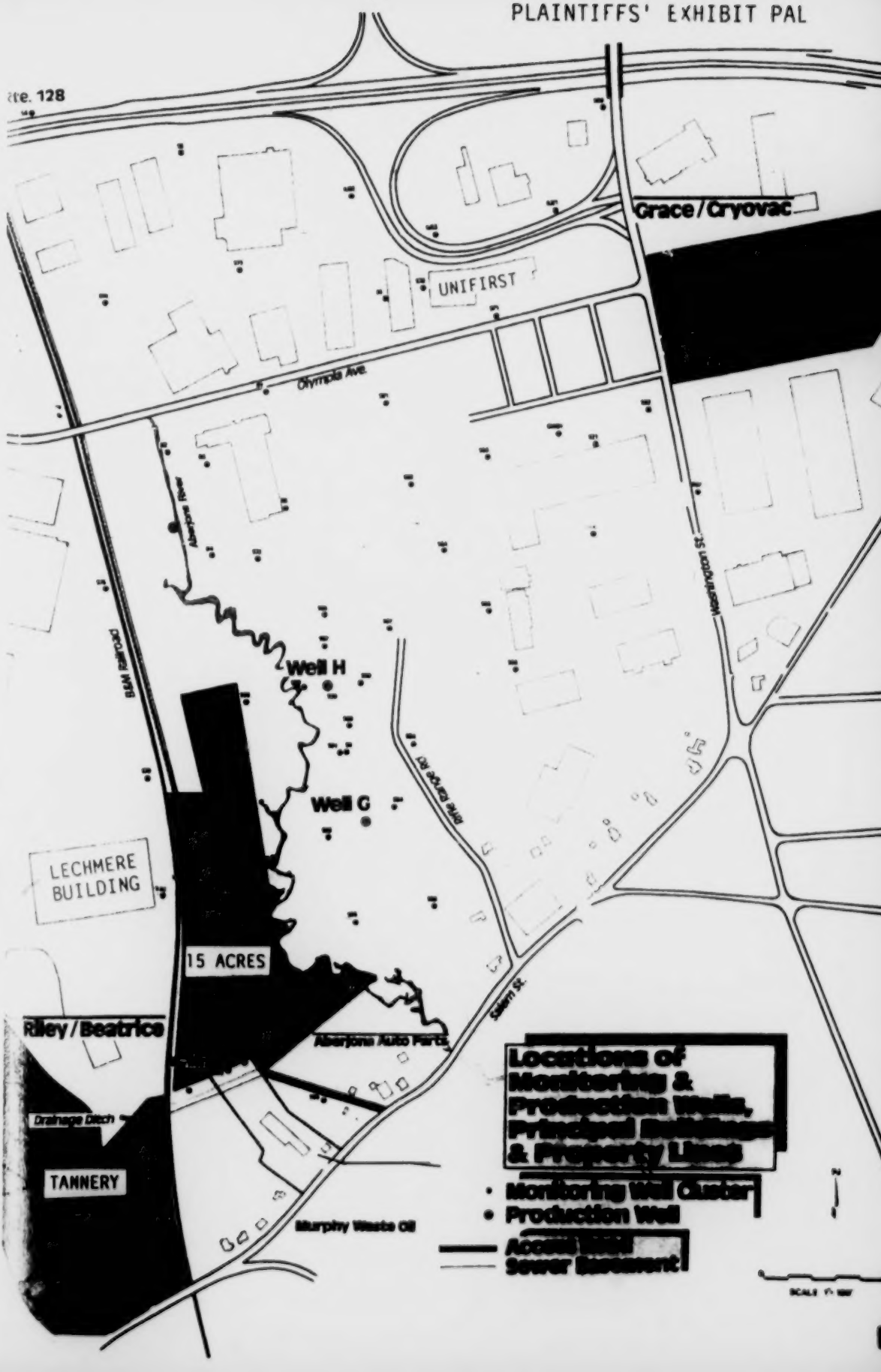
MR. QUARLES: The H Nu.

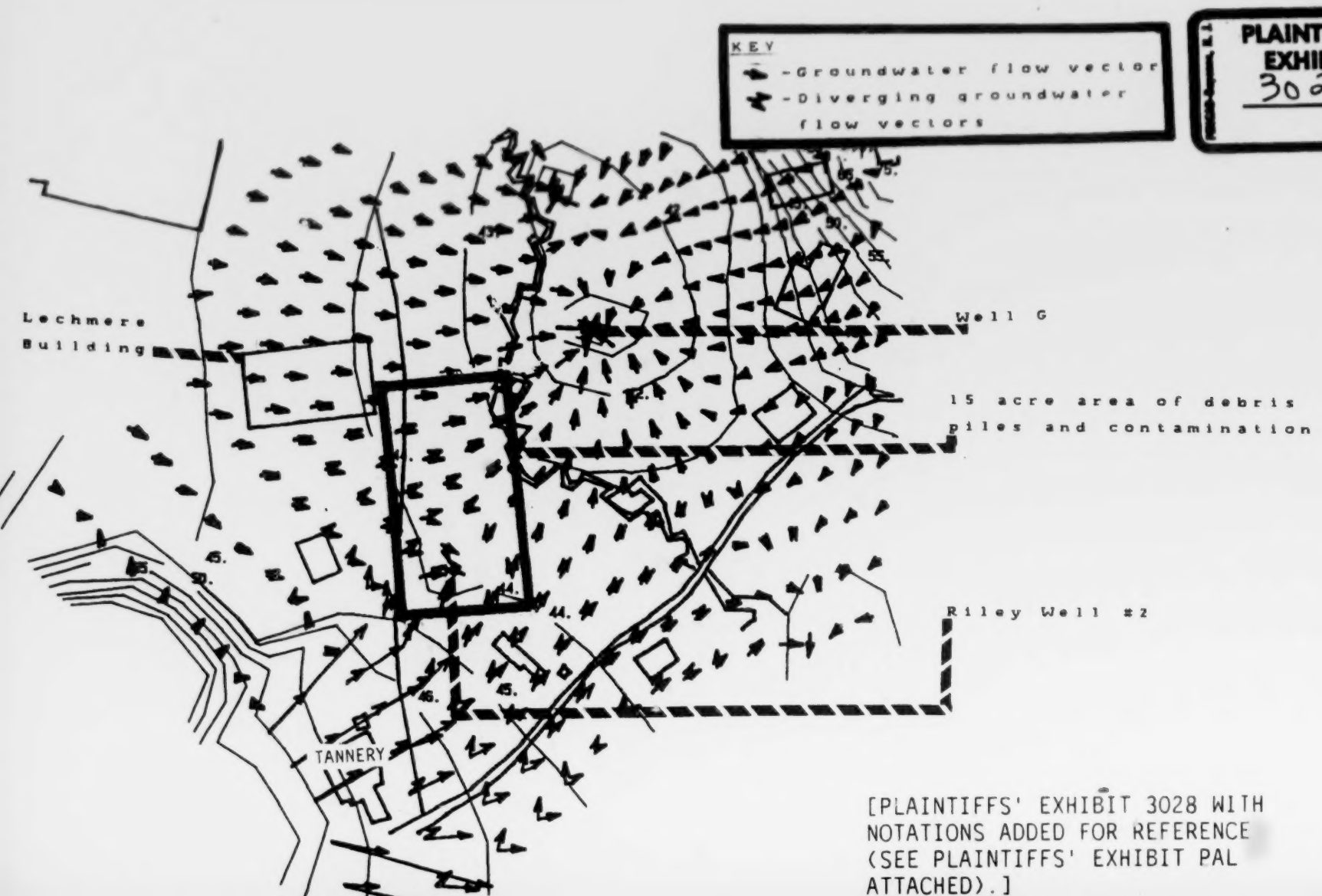
THE COURT: This H Nu thing.

MR. QUARLES: Then soil samples were taken and then three wells were driven down through bedrock.

APPENDIX W.

PLAINTIFFS' EXHIBIT PAL





[PLAINTIFFS' EXHIBIT 3028 WITH NOTATIONS ADDED FOR REFERENCE (SEE PLAINTIFFS' EXHIBIT PAL ATTACHED).]

APPENDIX X.

Federal Rules of Civil Procedure

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions. Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Rule 26. General Rules Governing Discovery.

(g) SIGNING OF DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurrred because of the violation, including a reasonable attorney's fee.

Rule 37. Failure To Make or Cooperate in Discovery; Sanctions.

(a) MOTION FOR ORDER COMPELLING DISCOVERY. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurrred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justtified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) FAILURE TO COMPLY WITH ORDER.

(1) *Sanctions by Court in District Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6), or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order under

Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(F) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) EXPENSES ON FAILURE TO ADMIT. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) FAILURE OF PARTY TO ATTEND AT OWN DEPOSITION OR SERVE ANSWERS TO INTERROGATORIES OR RESPOND TO REQUEST FOR INSPECTION. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

[(e) SUBPOENA OF PERSON IN FOREIGN COUNTRY.] (Abrogated)

(f) (Repealed, eff. October 1, 1981)

(g) FAILURE TO PARTICIPATE IN THE FRAMING OF A DISCOVERY PLAN. If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

* * * * * * *

Rule 60. Relief From Judgment or Order.

(b) MISTAKES; INADVERTENCIES; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judg-

ment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, § 1655, or to set aside a judgment for fraud upon the court. Writes of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.